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A TREATISE

ON THE

LAW OF MORTGAGES.

EIGHTH EDITION.

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COOTE'S

TREATISE ON THE

LAW OF MORTGAGES.

EIGHTH EDITION

BY

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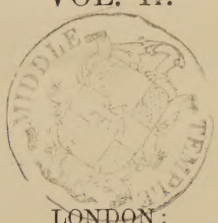
VOL. II.



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CHAPTER XLII.

THE NATURE AND INCIDENTS OF THE ESTATE OF THE MORTGAGEE.

Section I.

Rights incident to Mortgagee's Estate.

i.—General Remarks.—Every mortgagee, claiming under a legal mortgage, so long as the property in mortgage is redeemable, has a twofold interest therein, viz., a legal interest, which is either real or personal according to the nature of the property; and a beneficial interest, which in the eye of equity is personal estate.

A mortgagee in whom the legal estate is vested is regarded during the continuance of the mortgage as being at law the owner of the property, with the legal rights and remedies incident to such ownership; subject, nevertheless, to certain qualifications enforceable in equity for the protection of the mortgagor. Although, since the Judicature Act, the rules of law and equity are administered in all Divisions of the High Court, and in case of conflict the rules of equity are to prevail (*a*), yet the principles of the common law have not been swept away; "it was not intended by the legislature, and it

(*a*) 36 & 37 Vict. c. 66, s. 25 (11).

Chap. XLII. § 1 (i.)

has not been said, that legal and equitable rights should be treated as identical, but that the Courts should administer both legal and equitable principles" (*b*).

Right of mortgagee to accretions to mortgaged property.

By virtue of the mortgagee's beneficial interest, he will be entitled to all accretions to the mortgaged property, whether his security be legal or equitable, such as copyholds purchased by the lord of a mortgaged manor subsequently to the mortgage (*c*); or a renewed term obtained by a mortgagor of leaseholds (*d*).

Compensation under Lands Clauses Act.

So, also, if mortgaged lands (*e*) or business premises (*f*) are compulsorily taken by a public company under the Lands Clauses Act, 1845, the compensation for the lands in the one case, or for the goodwill of the business in the other case, will become subject to the security; but not, in the latter case, if the goodwill is owing to the personal skill of the mortgagor (*g*).

If land is taken by a company, and there is a doubt whether the persons in possession are mortgagees, the purchase-money is invested and the dividends paid to the persons in possession without prejudice to any question or application (*h*).

Compensation under Licensing Act.

Where a brewery company has specifically mortgaged its licensed premises to trustees to secure debenture stock, the trustees are entitled to receive the compensation awarded under the Licensing Act, 1904, in respect of refusal to renew the licence, but the mortgagors being in possession are entitled to the interest on the compensation until the security becomes enforceable (*i*). Such compensation moneys are capital moneys, and can be applied as such by the trustees at their discretion (*k*).

Right of voting for Parliament.

ii.—Personal Rights and Privileges of Mortgagee.—A mortgagee, if in possession, but not otherwise, will be entitled to vote for a return of members to Parliament. By sect. 74 of the statute 6 & 7 Vict. c. 18, it is provided that no person shall be entitled to vote at such elections for or by reason of any

(*b*) Per Cotton, L.J., in *Joseph* v. *Lyons*, 15 Q. B. D. 280, at p. 286, C. A.

(*c*) *Doe* v. *Pott*, 2 Doug. 709.

(*d*) See *ante*, p. 171.

(*e*) *Ranken* v. *East and West India Docks Co.*, 12 Beav. 298.

(*f*) *Pile* v. *Pile*, 3 Ch. D. 36. See as to rights of equitable mortgagees, *Martin* v. *London, Chatham and Dover Rail. Co.*, L. R. 1 Ch. 501.

(*g*) *Cooper* v. *Met. Board*, 25 Ch. D. 472.

(*h*) *Exp. Cork*, 11 W. R. 1015.

(*i*) *Law Guarantee, &c.* v. *Mitcham Brewery*, (1906) 2 Ch. 98.

(*k*) *Noakes* v. *Noakes*, (1907) 1 Ch. 64; *Dawson* v. *Braime's Tadcaster Breweries*, (1907) 2 Ch. 359; *Re Bentley's Breweries*, (1909) 2 Ch. 609.

trust estate or mortgage, unless such trustee or mortgagee be in actual possession or receipt of the rents and profits of the estate.

Right to settlement.

A mortgagee in possession may gain a settlement under the poor laws (*l*), provided that he resides within ten miles of the parish in which the mortgaged land is situate (*m*).

Presentation to benefice.

It has been seen (*n*) that the mortgagee of an advowson is compellable on a vacancy to present the nominee of the mortgagor.

iii.—Actions by Mortgagee for Protection of the Security.

Right of legal mortgagee to possession.

—A mortgagee, being the owner of the legal estate in the mortgaged lands, may bring an action for recovery of the land against the mortgagor and those claiming under him, in order to obtain the possession of the lands, to which he is entitled as an inherent right by virtue of his estate (*o*).

Right to protect security.

A mortgagee, whether legal or equitable, is entitled to maintain and defend actions, as against the mortgagor and those claiming under him, which may be necessary either for the protection of the mortgaged property or of his own security.

Where equities are equal, legal security will prevail.

A defective conveyance may be made good against the heir of the mortgagor, yet this right was thought to be a personal equity, and not binding against him (*p*).

Where a purchase was made of copyhold without any surrender, there being a covenant from the vendor to surrender, a mortgage from the purchaser was postponed to a mortgage by the vendor without notice of the covenant to surrender and followed by admittance (*q*). The equities being equal, the Court would not supply the defect of the surrender against the legal title.

Another case was decided against a subsequent purchaser, on the ground of notice of the prior defective mortgage (*r*); otherwise, the purchaser's title would, if he had the legal estate and no notice, have prevailed (*s*).

Where all incumbrances equitable.

But where several incumbrances are equitable, and the first is merely inchoate, the defect will not be relieved against to the

(*l*) *Rex* v. *Inhabitants of Catherington*, 3 T. R. 771.
(*m*) 6 & 7 Vict. c. 18, s. 74.
(*n*) *Ante*, p. 177.
(*o*) See as to right of mortgagee to take possession, *inf.* p. 821.
(*p*) *Morse* v. *Faulkner*, 1 Anst. 11.
(*q*) *Oxwith* v. *Plummer*, Bac. Abr. tit. *Mortgages* (E.) 3.
(*r*) *Jennings* v. *Moore*, 2 Vern. 609, cited 34 C. D. p. 50.
(*s*) Bac. Abr. tit. *Mortgages* (E.) 3.

prejudice of the later incumbrance. So where a recognizance, the time for inrolment of which had elapsed, was inrolled by special order against an estate which was subject to a legal mortgage, and, after the date but before the inrolment of the recognizance, a person who had lent money to the conusor took a judgment for the debt, it was held that, as neither the recognizance nor the judgment could be reached without the aid of equity, the judgment creditor must be preferred (*t*).

Acquisition of good title by mortgagor.

If the mortgagor's title be altogether defective, and he afterwards acquire a good title, he can be compelled to make good the defective conveyance (*u*).

Questions as to the rights of persons under defective conveyances may be settled in suits between mortgagors and mortgagees, in which the mortgagee has a right to bring before the Court all who claim interests in the estate (*x*). To an action brought by a mortgagee for specific performance of a covenant by a tenant in tail in remainder to disentail the estate after the death of the tenant for life, judgment creditors of the tenant in tail whose debts have been made charges on his estate under 1 & 2 Vict. c. 110, are not necessary parties (*y*).

Right to maintain and defend actions affecting the mortgaged property.

A mortgagee, whether in possession or not, may, generally speaking, by reason of his estate or interest in the mortgaged property, maintain or defend actions relating thereto against persons other than the mortgagor (*z*). So, if the mortgagor's title is impeached, he may properly support it, and will be allowed his costs for so doing (*a*).

Trespass and trover.

But a mortgagee of lands cannot maintain an action of trespass against a stranger (*b*), nor can a mortgagee of chattels sue either in trespass or trover, until, in either case, his right to take possession has attached (*c*), which right, in the absence of any stipulation to the contrary, attaches immediately after the execution of the mortgage (*d*).

(*t*) *Fothergill* v. *Kendrick*, 2 Vern. 234. See *Bothomley* v. *Fairfax*, 2 Vern. 750. And see further as to priorities generally, *post*, Chaps. LV.—LIX.

(*u*) *Smith* v. *Baker*, 1 Y. & C. C. C. 223; *Taylor* v. *Debar*, 1 Ch. Ca. 274; *Seabourne* v. *Powell*, 2 Vern. 11. See per Lord Cranworth, *Smith* v. *Osborne*, 6 H. L. C. 390.

(*x*) *Evans* v. *Jones*, Kay, 29.

(*y*) *Petre* v. *Duncombe*, 7 Ha. 24.

(*z*) *Langton* v. *Langton*, 7 De G. M. & G. 30; *Phéné* v. *Gillam*, 5 Ha. 1; *Sandon* v. *Hooper*, 6 Beav. 246.

(*a*) *Ibid.* See *Godfrey* v. *Watson*, 3 Atk. 518.

(*b*) *Wheeler* v. *Montefiore*, 2 Q. B. 133.

(*c*) *Ibid.*; *Bradley* v. *Copley*, 1 C. B. 685.

(*d*) *Doe* v. *Lightfoot*, 8 M. & W. 553.

The entry of a mortgagee relates back to the time when he had the right to enter so as to support an action for trespass committed after accrual of the right and before actual entry (*e*).

Semble, it is no objection to an action by a mortgagee for damages for breach of covenant in a lease that he has not realised to test its sufficiency (*f*).

Appeal as to public-house licence.

A mortgagee of a public-house is a "person aggrieved" by the refusal of the justices to renew the licence to sell beer within the statute 9 Geo. IV. c. 61, s. 27, and entitled to appeal to quarter sessions accordingly (*g*).

Mortgagee necessary party.

It has been seen that, as a general rule, a mortgagee having the legal estate must be made a party to all actions brought by or against the mortgagor in relation to the mortgaged property (*h*).

Setting aside mortgaged contract for purchase.

Where, after a deposit paid by a purchaser, he assigns his interest under the contract by way of mortgage, and afterwards a fraud is discovered on the part of the vendor, by which the contract was originally vitiated, the mortgagee may set aside the contract, and obtain payment of the deposit with interest, and is not open to a charge of champerty; but in such a case it seems that the mortgagor should be a party co-plaintiff, and not a defendant (*i*).

Assignment of mortgage *pendente lite*.

Where a first mortgagee, pending a suit with a party claiming adversely to the mortgagor, assigned the first mortgage, with power to prosecute the suit to a second mortgagee, who covenanted to indemnify the assignor against the costs of the action; it was held, on demurrer, that the second mortgagee being interested as such in the subject of the suit, the assignment was not to be deemed champerty (*k*).

And as a *bonâ fide* assignment of the subject of a suit may be made pending that suit (*l*), it would seem that it is open either to a mortgagor or mortgagee during a redemption or foreclosure suit to assign his interest in that suit.

Liability of mortgagee for loss to estate by non-claim.

Under certain circumstances, a mortgagee refusing or neglecting to take proceedings necessary to support the title or maintain rights incident to the ownership may be liable in damages to

(*e*) *Ocean Accident Corp.* v. *Ilford Gas Co.*, (1905) 2 K. B. 493.
(*f*) *Molyneux* v. *Richard*, (1906) 1 Ch. 34.
(*g*) *Garrett* v. *Middlesex Justices*, 12 Q. B. D. 620.
(*h*) *Ante*, p. 652.
(*i*) *Wilson* v. *Short*, 6 Ha. 366.
(*k*) *Hunter* v. *Daniel*, 4 Ha. 420.
(*l*) *Harrington* v. *Long*, 2 My. & K. 592.

the mortgagor by reason of the mortgaged property being lost or prejudicially affected.

Neglect to claim rent.

Although a mortgagee in possession will be liable if he allows the mortgaged lands to be occupied by tenants without enforcing the payment of the rents (*m*), yet, where he has distrained for rent, he is not bound to defend doubtful actions respecting the goods distrained (*n*).

Neglect to enforce security.

On the same principle, where a creditor received from his debtor an assignment of a debt due from a third person as a security for his demand, and sued out execution upon the judgment, but, by his neglect in levying, the debt assigned became irrecoverable, it was held that he must bear the loss, although the assignment contained the usual covenant for payment of his debt (*o*).

But mere delay, as distinguished from consent to distribution, is not sufficient to prevent mortgagees, whose security proves insufficient, from coming against the residuary legatees amongst whom the personal estate of the mortgagor has been distributed (*p*).

Neglect to enforce payment of interest by tenant for life.

If a mortgagee of a settled estate neglects to enforce the keeping down of the interest by the tenant for life, his remedy for arrears will lie only against the tenant for life or his legal representatives, and not against the estate in the hands of the remainderman. Where (*q*) an estate being already in mortgage was devised in strict settlement, and the mortgagee permitted the tenant for life in possession to run the interest in arrear, and afterwards purchased the estate for life, and entered into possession as purchaser and received the rent for about three years, when the tenant for life died, the rents and profits received by the mortgagee were directed to be applied, first in payment of the interest, which accrued due subsequently to his entering into possession, and in the next place, so far as they would extend, in satisfaction of the preceding arrears. In an earlier case (*r*) a term was created for raising portions out of annual profits; the mortgagee permitted

(*m*) *Brandon* v. *Brandon*, 10 W. R. 287.

(*n*) *Cocks* v. *Gray*, 1 Giff. 77.

(*o*) *Williams* v. *Price*, 1 S. & St. 581; *Mayer* v. *Murray*, 8 Ch. D. 428.

(*p*) *Ridgway* v. *Newstead*, 3 De G. F. & J. 474; *Blake* v. *Gale*, 32 Ch. D. 571; *Harrison* v. *Kirk*, (1904) A. C. 1; *Re Eustace*, (1912) W. N. 80.

(*q*) *Lord Penrhyn* v. *Hughes*, 5 Ves. 99.

(*r*) *Ivy* v. *Gilbert*, 2 P. Wms. 20; *Bentham* v. *Haincourt*, 1 Eq. Ca. Abr. 320.

the tenant for life to enjoy the estate under the usual clause, that it should be lawful for the mortgagor to take the profits until default: the Court held that the rents being received by the tenant for life, with the permission of the mortgagee, it was the same as if the mortgagee had let the estate to any other person, and therefore the profits received by the tenant for life with the mortgagee's permission should be considered as if received by the mortgagee himself, and be accounted for accordingly, and that he might have his remedy over against the personal representatives of the tenant for life.

Section II.

Mortgagee in Possession.

When the right of legal mortgagee to enter into possession arises.

i.—Right of Mortgagee to Possession.—Immediately upon the execution of a conveyance of land by way of mortgage, whereby the legal estate passes to the mortgagee, he becomes by virtue thereof the legal owner of the freehold and inheritance of the land, or of any lesser interest, such as a life estate or term of years conveyed by the deed. He is therefore, as between himself and the mortgagor, entitled, so soon as any default has been made in payment of the principal or interest, if the deed contains a proviso for quiet enjoyment (*s*), or, if there be no such proviso, then immediately upon or at any time after the execution of the mortgage deed, to enter into possession of the land, or if the land be in lease or in the occupation of tenants, to give to them notice to pay the rents to him, and to receive the rents accordingly (*t*).

Proviso for quiet enjoyment.

It was formerly usual to insert in mortgage deeds an express proviso to the effect that it should be lawful for the mortgagor to retain possession, and receive the rents and profits, until default in payment of the principal and interest on the day fixed. But such provisoes are now generally omitted, for, having regard to the disadvantages attending the position of

(*s*) *Keech* v. *Hall*, 1 Doug. 22; *Moore* v. *Shelley*, 8 App. Ca. 285.

(*t*) *Moss* v. *Gallimore*, 1 Doug. 279; *S. C.*, 1 Sm. L. C. (11th ed.) p. 514; *Pope* v. *Biggs*, 9 B. & Cr. 245; *Exp. Living, Re Tombs*, 2 M. & A. 223; *Re Ind, Coope & Co.*, (1911) 2 Ch. 223; *ante*, p. 693.

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a mortgagee in possession, and as, apparently, the entry will entitle the mortgagor to redeem at once without notice or interest in lieu of notice (*u*), it is generally considered that the risk of a mortgagee entering within the period before default can be made, which is usually six months from the date of the deed, is one which, in practice, it is not necessary to guard against. The result is that a mortgagee at the present time can generally enter into possession whenever he thinks fit to do so.

Damages for improper entry.

If the mortgage deed contains a proviso for quiet enjoyment till default, the mortgagee will be liable in damages if he enter before default (*x*).

How entry may be made and enforced.

It seems that the Court will in no case interfere to prevent a mortgagee from lawfully exercising his right to enter into possession (*y*). A mortgagee having the legal estate may take possession of the property by peaceable entry without any notice or demand of possession (*z*); but he cannot take forcible possession or forcibly eject the mortgagor (*a*); though for the purpose of such entry he may break open the outer door of a house, if it be done in the absence of the mortgagor or his tenants (*b*); or, if his entry is resisted, he may bring an action for recovery of the land (*c*), now substituted for the action of ejectment formerly brought in such cases under the old practice (*d*).

Entry after distress by mortgagee.

Where a mortgage deed contained a clause that the mortgagor should be tenant at a certain yearly rent, with a power of entry on default of payment of the mortgage money, it was held that after default the mortgagee was entitled to eject the mortgagor without any notice to quit, though he had treated the mortgagor as tenant by distraining on him for a previous year's rent (*e*).

Writ of possession.

A mortgagee recovering in ejectment could not retain posses-

(*u*) *Bovill* v. *Endle*, (1896) 1 Ch. 648.

(*x*) *Moore* v. *Shelley*, 8 App. Ca. 285.

(*y*) *Williams* v. *Medlicott*, 6 Pri. 496. See *Cholmondeley* v. *Clinton*, 2 Mer. 171, at p. 359.

(*z*) *Doe* v. *Maisey*, 8 B. & Cr. 767; *Doe* v. *Giles*, 5 Bing. 421.

(*a*) *Edwick* v. *Hawkes*, 18 Ch. D. 199.

(*b*) *Lows* v. *Telford*, 1 App. Ca. 414. See *Watson* v. *Waltham*, 2 A. & E. 485.

(*c*) Ord. III. r. 6.

(*d*) See *Doe* v. *Lord*, 7 A. & E. 610.

(*e*) *Doe* v. *Olley*, 12 A. & E. 481. See *Doe* v. *Tom*, 4 Q. B. 615. And cf. *Clowes* v. *Hughes*, L. R. 5 Ex. 160.

sion independently of the writ of possession; so that when the writ was set aside for irregularity he was ordered to restore possession (*f*); and it would seem that the same rule would apply in an action for recovery of land under the present practice (*g*).

Equitable mortgagee cannot take actual possession.

The right to enter into possession of the mortgaged lands and to receive the rents and profits thereof, being enforceable only by legal remedy by means of an action for recovery of the land, now substituted for ejectment, can only be exercised by a mortgagee in whom the legal estate is vested. It is obvious that, if a mortgagee whose charge is merely equitable were to enter into possession, he would be liable to be evicted by the owner of the legal estate, being either a prior incumbrancer, or the mortgagor himself, or a trustee for him. An equitable mortgagee can have recourse only to equitable remedies, and his only means of impounding the rents and profits is by obtaining the appointment of a receiver, to which he may be entitled, provided the first mortgagee is not in possession, and subject to his right to apply for possession if he should think fit (*h*).

Equitable possession.

A *puisne* mortgagee may, however, require the prior mortgagee to pay the surplus rents and profits to him instead of to the mortgagor; such notice is taking equitable possession of the surplus rents (*i*).

Exception as to charges registered under Land Titles and Transfer Act, 1875.

To this rule, however, an exception appears to be introduced by a modern statute, so far as relates to charges registered thereunder. By the Land Transfer Act, 1875 (*k*), it is enacted as follows:—

Entry by proprietor of charge.

Sect. 25. "Subject to any entry to the contrary on the register, the registered proprietor of a registered charge may, for the purpose of obtaining satisfaction of any moneys due to him under the charge, at any time during the continuance of his charge, enter upon the land charged or any part thereof, or into the receipt of the rents and profits thereof, subject, nevertheless, to the right of any persons appearing on the register to be prior incumbrancers, and to the liability attached to a mortgagee in possession."

Effect of this enactment.

The expression "charge," for the purposes of the Act, means any charge made in manner prescribed by the general rules made in pursuance of the Act, to secure the payment at an

(*f*) *Doe* v. *Lord*, 7 A. & E. 710.
(*g*) See *Morris* v. *Baker*, 73 L. J. Ch. 143. As to writs of possession, see Ord. XLVII.
(*h*) See *inf.* p. 824.
(*i*) *Parker* v. *Calcraft*, 6 Madd. 11.
(*k*) 38 & 39 Vict. c. 87. See r. 159 and Form 44B.

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appointed time of any principal sum of money either with or without interest (*l*); and any number of successive "charges" may be registered under the Act, which will rank in priority as among themselves according to the dates of their respective registration. It would therefore seem clear that any incumbrancer whose charge is duly registered may enter into possession, without reference to the question as to whether the legal estate is vested in him or not, provided that no prior incumbrancer is in possession before him, and without prejudice to the right of such prior incumbrancer to claim possession in his stead.

Entry where mortgage debt payable on demand.

In cases where the right of the mortgagee to possession only arises upon default after notice or demand for payment, it must be shown in order to establish such default, that a reasonable time for payment was allowed; an allowance of half an hour is merely illusory (*m*); and it would seem that entry into possession on the same day as the demand would be deemed unreasonable (*n*); but, if the seizure be premature, the taking of possession will be justified if default continues after a reasonable time (*o*).

When the mortgagee should give notice before entry.

So, where a mortgage deed stipulated for the payment of the mortgage moneys on demand, and, in effect, that the mortgagor should remain in possession until default in such payment, and such demand was made by a person who represented himself as the mortgagee's agent, who, upon non-payment, forthwith entered into possession and seized the mortgaged property: it was held, in an action of trespass against the mortgagee, that the mortgagor was entitled to a reasonable opportunity for inquiry as to whether the person demanding payment was in fact the mortgagee's agent, so that the non-payment did not constitute any default on his part, and that the mortgagee was responsible in substantial damages for the trespass (*p*).

In such cases a demand made upon the debtor's wife has been held not to be such a demand as to give the mortgagee a right to possession upon default (*q*).

Mortgagee cannot enter

A mortgagee cannot enter into possession if a receiver has

(*l*) 38 & 39 Vict. c. 87, s. 22; *ante*, p. 44.

(*m*) *Toms* v. *Wilson*, 4 B. & S. 442, 455; *Moore* v. *Shelley*, 8 App. Ca. 285, P. C.

(*n*) *Exp. Trevor, Re Burghardt*, 1 Ch. D. 297.

(*o*) *Bramwell* v. *Eglingtoun*, 12 W. R. 551.

(*p*) *Moore* v. *Shelley*, 8 App. Ca. 285.

(*q*) *Belding* v. *Read*, 34 L. J. Ex. 212.

been appointed by the Court on the application of a subsequent incumbrancer, unless his right so to do is reserved by the order; in such a case the prior mortgagee cannot obtain the rents from the receiver by giving notice to him, nor can he intercept the rents from being paid to the receiver by giving notice to tenants; he must either obtain the removal of the receiver, or the leave of the Court to bring an action for the recovery of the land (*r*). If the Court removes such receiver, possession may be ordered to be delivered to the first mortgagee (*s*).

when receiver has been appointed.

Nor can the mortgagor distrain where a receiver has been appointed by the mortgagee under the Conveyancing Act (*t*).

Nor can mortgagor distrain.

ii.—Leases by Mortgagee in Possession.—Before the Conveyancing Act, 1881 (*u*), a considerable disability annexed to the estate of the mortgagee was, that although he was at law the actual owner, and consequently could make a good legal title, yet he could not in equity make a valid or binding lease without the concurrence of the mortgagor, unless, it seems, there was an absolute necessity for it (*x*).

Where a mortgagee enters into an agreement for a lease (not having power to grant a valid lease), specific performance will not lie (*y*); the relief would be in damages only.

By sect. 18 of the Act above referred to (which is not retrospective (*z*)), it is enacted that:—

"(2.) A mortgagee of land while in possession shall, as against all prior incumbrancers, if any, and as against the mortgagor, have, by virtue of this Act, power to make from time to time any such lease as aforesaid" (*a*).

Under this section a mortgagee can only exercise the power of leasing while in possession. But by the Conveyancing Act, 1911 (*b*), the power may be exercised after a receiver has been

(*r*) *Angell* v. *Smith*, 9 Ves. 335; *Thomas* v. *Brigstock*, 4 Russ. 64; *Morris* v. *Baker*, 73 L. J. Ch. 143.

(*s*) *Langton* v. *Langton*, 7 De G. M. & G. 30.

(*t*) *Bayly* v. *Went*, 51 L. T. 764, *post*, p. 952.

(*u*) 44 & 45 Vict. c. 41.

(*x*) *Hungerford* v. *Clay*, 9 Mod. 1. As to apportionment of rent where a mortgagee by mistake had granted a lease of property not included in his mortgage, see *Harryman* v. *Collins*, 18 Beav. 11.

(*y*) *Franklinski* v. *Ball*, 33 Beav. 560.

(*z*) See sect. 18, sub-s. (16).

(*a*) *I.e.*, such lease as in this section described and authorized. The requirements of this section as regards leases by mortgagees in possession are the same as in the case of leases granted thereunder by mortgagors in possession, and have been already considered. See *ante*, pp. 708 *et seq.*

(*b*) 1 & 2 Geo. V. c. 37, s. 3 (11), set out *ante*, Chap. XXXVII (vi).

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appointed by the mortgagee under the former Act and so long as the receiver acts in like manner as if the mortgagee were in possession.

A mortgagee who has granted a lease under this section will be, as between himself and the lessee, in the position of an ordinary lessor as regards the power of suing for rents and enforcing other remedies of a landlord. He may also accept a surrender of such lease for the purpose of enabling a new lease to be granted (*c*).

The rights and remedies for enforcing payment of rents of a mortgagee, who has given notice to pay rent to him, to lessees, and others, holding under leases or tenancies subsisting at the date of the mortgage or created thereafter by the mortgagor with or without the mortgagee's concurrence, have been already considered (*d*).

Right to emblements.

iii.—Effect of entry into Possession.—A mortgagee entering into possession of the land, in the occupation of the mortgagor, is entitled, as against the mortgagor or his trustee in bankruptcy, to emblements (*e*); but under the Tenants' Compensation Act, 1890, he is bound to give compensation to the tenant for crops, improvements, tillages, &c.

Injunction against removing crops, &c.

If possession be lawfully demanded by the mortgagee, the mortgagor, or any person claiming under him, as his trustee in bankruptcy, wrongfully refusing possession, may be restrained by injunction from cutting and removing crops on the mortgaged land (*f*).

Right to carry on business.

If in possession of business premises, the mortgagee is entitled to carry on the business for such reasonable time as will enable him to sell it as a going concern, and for that purpose to use the name of the mortgagor's firm (*g*).

And where there is a mortgage of a business as a going concern, the mortgagee in possession is entitled to be recouped losses incurred without negligence in carrying it on, out of the proceeds of sale (*h*).

(*c*) 1 & 2 Geo. V. c. 37, s. 3, set out *ante*, Chap. XXXVII. (vi)

(*d*) *Ante*, Chap. XXXVII.

(*e*) *Keech* v. *Hall*, 1 Doug. 22; *Moore* v. *Shelley*, 8 App. Ca. 285, P. C. See *Doe* v. *Maisey*, 8 B. & Cr. 767.

(*f*) *Bagnall* v. *Villar*, 12 Ch. D. 812.

(*g*) *Cook* v. *Thomas*, 24 W. R. 427.

(*h*) *Bompas* v. *King*, 33 Ch. D. 279. As to working mines, see *post*, Chap. LIV., Sect. III.

If the mortgage includes the goodwill of the business of a publican, the mortgagee, on taking possession, is entitled to call on the mortgagor to concur in obtaining a transfer to the mortgagee of the existing licence (*i*).

It would seem that the fact of a mortgagee taking possession of a business will not of itself operate as a dismissal of the clerks and servants of the mortgagor employed in the business (*k*).

Application of rents and profits.

A mortgagee, when he enters into possession of the mortgaged estate, enters for the purpose of recovering both his principal and interest, and may apply the rents and profits received by him in or towards payment thereof accordingly (*l*).

A mortgagee in possession is not, however, bound to apply the surplus rents after keeping down his interest and outgoings in gradual reduction of principal; he may, if he thinks fit, pay such surplus rents to the mortgagor unless he has notice from a subsequent incumbrancer to pay them to him (*m*).

A mortgagee in possession, who retains the surplus rents in reduction of principal, does not render annual accounts, but when the mortgagor deems the debt satisfied, or wishes to redeem, he calls on the mortgagee for a final adjustment (*n*).

Liability of mortgagee in possession to account.

iv.—Liabilities of Mortgagee in Possession.—A mortgagee by entering into possession incurs serious responsibilities. He must be reasonably diligent in getting in the rents and profits, and he will be held strictly accountable to the mortgagor and those claiming under him for all rents and profits actually received, or which, but for his default, might have been received, by the mortgagee after deducting what is due to him under his mortgage, including all just and proper costs and allowances (*o*).

Ground of liability.

A mortgagee in possession is charged with the rents and profits which, but for his default, he might have received, because he has chosen to change his character of mere mortgagee, and for the time being to become owner (*p*).

(*i*) *Rutter* v. *Daniel*, 30 W. R. 724, 801.

(*k*) Per Fry, L.J., in *Reid* v. *Explosives Co.*, 19 Q. B. D. 264, at p. 269.

(*l*) *Lord Kensington* v. *Bouverie*, 7 De G. M. & G. 134, 157.

(*m*) *Berney* v. *Sewell*, 1 J. & W. 647.

(*n*) *Lord Trimleston* v. *Hamill*, 1 Ba. & Be. 377, 383.

(*o*) See *post*, Chap. LIV.

(*p*) *Eyre* v. *Hughes*, 2 Ch. D. 148, at p. 162.

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Measure of liability.

Although the mortgagee is bound to account to the mortgagor for the rents, yet he is not obliged to account according to the actual value of the land, nor bound by any proof that the land is worth so much, unless it can be proved that he made so much of it, or might have done so except for his own wilful default (*q*); because it is the laches of the mortgagor that he lets the lands lapse into the hands of the mortgagee by the non-payment of the money; therefore, when the mortgagee enters, he is only accountable for what he actually receives, and is not bound to take the trouble of making the most of another's property.

Partial possession.

Where the mortgagee is in possession of part of the mortgaged property and the mortgagor of the rest, the mortgagee is not to be held in possession constructively of the whole as to subsequent incumbrances so as to render him liable for default in respect of the part which is still in the possession of the mortgagor (*r*).

Mortgagee liable to subsequent incumbrancers.

A mortgagee who has taken possession must account for the rents and profits not only to the mortgagor himself, but also to his subsequent incumbrancers or creditors, and will be chargeable as for wilful default if he unduly favours the mortgagor at their expense; as if he permits the mortgagor to make use of his mortgage as the first incumbrance to keep out other creditors.

So, if the mortgagee enter, and afterwards permit the mortgagor to receive the rents, on an action by a subsequent incumbrancer to redeem, he will be charged with all the profits he might have made after his entry (*s*). But the mortgagee will not in such case be answerable for profits which he might have made previously to the date of the next incumbrance (*t*).

Notice by subsequent incumbrancer to pay surplus rents to him.

A mortgagee in possession who has not received notice of any subsequent incumbrance may safely pay the surplus rents and profits to the mortgagor, but, after notice, the first mortgagee is answerable to the second if he pays the rents and profits to the mortgagor (*u*).

Liability after assign-

If a mortgagee in possession assign his mortgage without the

(*q*) See *inf.* p. 831.

(*r*) *Exp. Hooman*, L. R. 10 Eq. 63. See *Soar* v. *Dalby*, 15 Beav. 156; *Simmons* v. *Shirley*, 6 Ch. D. 173.

(*s*) *Coppring* v. *Cooke*, 1 Vern. 270; *Bentham* v. *Haincourt*, Prec. Ch. 30; *Loftus* v. *Swift*, 2 Sch. & L. 655.

(*t*) *Maddocks* v. *Wren*, 2 Rep. in Ch. 109.

(*u*) *Parker* v. *Calcraft*, 6 Madd. 11; *Maddocks* v. *Wren*, 2 Rep. in Ch. 109; *Berney* v. *Sewell*, 1 J. & W. 647; *Archdeacon* v. *Bowes*, 13 Pri. 353, 368.

concurrence of the mortgagor to an insolvent person, he will be liable for the rents as well after as before assignment, because he is in some sort a trustee of the estate (*x*). But this rule will not apply where the transfer is made by order of the Court, as in an administration action (*y*).

ment of mortgage.

A mortgagee is accountable for whatever is received by those to whom he transfers possession under an arrangement inoperative to transfer title and in derogation of the rights of the mortgagor (*z*).

Mortgagee accountable for receipts of others.

A mortgagor is not bound by an account (to which he is not a party) stated between the mortgagee and his assignee (*a*). The consequence is, that an assignee is in such case liable to account for all the profits received by the mortgagee and the intermediate assignees, and the mortgagor need make the last assignee only a party to his action (*b*).

Liability of transferee of mortgage.

In a suit for redemption brought against the legal personal representatives of a mortgagee who has taken possession, if the plaintiff in his claim asks only for an account of rents and profits received by the representatives, and an order is made on that footing, he will not be allowed to vary the order so as to direct also an account of rents and profits received by the original mortgagee (*c*).

Claim against estate of deceased mortgagee.

A mortgagee by demise from an assignee of a lease and who is in possession, is not liable to indemnify the lessee against the rent payable by him to the lessor (*d*).

Liability for rent.

It is the duty of the mortgagee in possession to keep the premises in necessary repair so far as the rents and profits in his hands will admit of. He will be held responsible for gross or wilful negligence in this respect (*e*), and an inquiry will be directed whether any deterioration has been occasioned thereby (*f*).

Liability for repairs.

This rule is applied with especial strictness where, the pro-

Forfeiture of lease.

(*x*) 1 Eq. Ca. Abr. 328; *Venable* v. *Foyle*, 1 Ch. Ca. 3.

(*y*) *Hall* v. *Heward*, 32 Ch. D. 430, C. A.

(*z*) *National Bank of Australasia* v. *United, &c. Co.*, 4 App. Ca. 391.

(*a*) *Earl of Macclesfield* v. *Fitton*, Vern. 169; *Matthews* v. *Wallwyn*, 4 Ves. 118; *Williams* v. *Sorrell*, 4 Ves. 389; *Chambers* v. *Goldwin*, 9 Ves. 254; *Dixon* v. *Winch*, (1900) 1 Ch. 736, C. A.; *Turner* v. *Smith*, (1901) 1 Ch. 213.

(*b*) *Chambers* v. *Goldwin*, *sup.*, at p. 266.

(*c*) *Trulock* v. *Roby*, 15 Sim. 265.

(*d*) *Bonner* v. *Tottenham, &c. Bldg. Soc.*, (1899) 1 Q. B. 161, C. A.

(*e*) *Russel* v. *Smithies*, 1 Anst. 96; *Taylor* v. *Mostyn*, 33 Ch. D. 226. See *Marriott* v. *Anchor Reversionary Co.*, 3 De G. F. & J. 177.

(*f*) *Wragg* v. *Denham*, 2 Y. & C. Ex. 117; *Batchelor* v. *Middleton*, 6 Ha. 75.

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perty being leasehold, the neglect to repair renders the lease liable to forfeiture. Thus, where a mortgagee entered into possession under his mortgage of unfinished leasehold buildings, and he neither sold the property nor completed the buildings, whereby the lease was forfeited, he was held liable for wilful default (*g*).

Extent of liability.

A mortgagee is not, however, bound to spend his own money on repairs, and accordingly he will only be liable for neglect to repair to the extent of surplus rents and profits after providing for the interest to which he is entitled under the mortgage (*h*); and a mortgagee is not bound to lay out money on the estate except for necessary repairs (*i*).

Rebuilding.

A mortgagee may pull down ruinous houses and build others on their site (*k*), but he is not bound to expend money in rebuilding (*l*).

Liability for waste.

A mortgagee in possession shall not be permitted to waste the estate (*m*); if he improperly proceed to fell timber, an account will be decreed and the produce applied, first, in payment of the interest, and then in sinking the principal, and the Court will enjoin him, unless the security prove defective, in which case the Court will not restrain him from felling timber, the produce being, of course, applied in liquidation of the debt in ease of the estate (*n*). But an injunction will not be granted where the waste is committed by other persons under an alleged custom, and not by the mortgagee or by his authority (*o*).

Right to cut timber.

Where the mortgage is made by deed executed after the commencement of the Conveyancing Act, 1881 (*p*), if and so far as a contrary intention is not expressed by and subject to the terms and provisions of the deed, a mortgagee has, by virtue of that Act (*q*), among other powers:—

Sect. 19 (1). "(iv.) A power, while the mortgagee is in possession, to cut and sell timber and other trees ripe for cutting, and

(*g*) *Perry* v. *Walker*, 24 L. J. Ch. 319, appealed on other points. See 33 Ch. D. p. 234.

(*h*) *Richards* v. *Morgan*, 4 Y. & C. Ex. App. 570.

(*i*) *Godfrey* v. *Watson*, 3 Atk. 518; *Sandon* v. *Hooper*, 6 Beav. 246.

(*k*) *Hardy* v. *Reeves*, 4 Ves. 466, 480; *Newman* v. *Baker*, Finch, 38; *Marshall* v. *Cave*, 3 L. J. Ch. 57.

(*l*) *Moore* v. *Painter*, 6 Jur. 903.

(*m*) *Hanson* v. *Derby*, 2 Vern. 392.

(*n*) *Withrington* v. *Bankes*, Sel. Ca. in Ch. 31.

(*o*) *Anon.*, 1 L. J. Ch. 119.

(*p*) 44 & 45 Vict. c. 41.

(*q*) *Ibid.*, s. 19, sub-ss. 1 (iv), 3, 4.

not planted or left standing for shelter or ornament, or to contract for any such cutting and sale, to be completed within any time not exceeding twelve months from the making of the contract."

It is conceived that the proceeds of sale of timber so cut will be treated as rents and profits, and must be accounted for by the mortgagee in possession accordingly (*r*).

Mismanagement of estate.

A mortgagee in possession will be personally liable for wilful default if he be guilty of gross mismanagement in conducting a business (*s*), or in the cultivation of an estate (*t*).

The mortgagee is liable if he demises the property subject to unduly restrictive covenants (*u*). So also, if he refuse or remove a sufficient tenant (*x*), but the evidence must be distinct, and the mortgagee will not be subject to minute inquiries whether he could have got more rent, and the like, and he may be excused for not accepting a higher offer, if the tenant is in arrear, and by removing him the arrear might have been lost (*y*); and it is the duty of the mortgagor to give notice to the mortgagee that a higher rent might have been obtained; and if the mortgagor omit to do so, or is party to any act to prevent the letting (*z*), he cannot charge the mortgagee with mismanagement.

A mortgagee not in possession is not liable for a breach of a statutory duty (*a*).

What amounts to taking possession as mortgagee.

v.—What amounts to taking Possession.—It is not every interference with an estate by a mortgagee that will make him for all purposes a mortgagee in possession (*b*). He will not necessarily be chargeable as a mortgagee in possession, because he is in receipt of the rents and profits of the mortgaged property. So, where an agent of the mortgagor who received the rents for him accepted notices to the tenants to pay the rents to the mortgagees, to be served if the mortgagor should interfere, and he did not serve the notices, but paid the rents as he

(*r*) Wolst. Conv. (8th ed.) p. 71.
(*s*) *Chaplin* v. *Young*, 33 Beav. 330.
(*t*) *Wragg* v. *Denham*, 2 Y. & C. Ex. 117.
(*u*) *White* v. *City of London Brewery Co.*, 42 Ch. D. 237, C. A.
(*x*) *Anon.*, 1 Vern. 45.
(*y*) *Metcalf* v. *Campion*, 1 Moll. 238; *Hughes* v. *Williams*, 12 Ves. 493; *Brandon* v. *Brandon*, 10 W. R. 287.
(*z*) *Lord Trimleston* v. *Hamill*, 1 Ba. & Be. 377, 385.
(*a*) *Brain* v. *Thomas*, W. N. (1881) 53, C. A.
(*b*) Per Wigram, V.-C., in *Faulkener* v. *Daniel*, 3 Ha. 220.

Chap. XLII. § 2 (v.)

received them to the mortgagees, it was held that the mortgagees could not be charged as mortgagees in possession (*c*). The test whether the receipt of the rents and profits amounts to possession was thus stated in that case:—"In order to hold that a mortgagee not in actual possession is in receipt of the rents and profits, in my opinion, it ought to be shown not only that he gets the amount of the rents paid by the tenants, even although he gets their cheques or their cash, but that he receives it in such a way that it can be properly said that he has taken upon himself to intercept the power of the mortgagor to manage his estate, and has himself so managed and received the rents as part of the management of the estate" (*d*).

Entry under lease from mortgagor.

Where a mortgagee took a lease from the mortgagor subsequent to a *puisne* mortgage, and entered into possession under the lease, he was, as against the latter, held to be chargeable as mortgagee in possession (*e*).

Entry as agent, &c.

In general, a mortgagee getting into possession, though he calls himself trustee, manager, or agent, will be treated as mortgagee in possession, and be accountable as such (*f*).

A solicitor who pays off a mortgage due from his client, and afterwards receives the rents of the mortgaged property, will be treated as his agent, and will not be held accountable as a mortgagee in possession (*g*).

Where a judgment creditor entered into possession under a power of attorney as agent and manager of the property, he was held not to be chargeable in respect of rents as mortgagee in possession; but having afterwards taken a transfer of the mortgage and remained in possession, he was held to be so chargeable (*h*).

Entry as tenant for life or purchaser.

Where a mortgagee enters into possession as tenant for life, or in the real or supposed character of purchaser, or as agent or trustee for the mortgagor, or in another character than mortgagee, he will not be chargeable as mortgagee in possession (*i*).

(*c*) *Noyes* v. *Pollock*, 32 Ch. D. 53, C. A.

(*d*) Per Cotton, L.J., *ibid.* at p. 61. See also *Richards* v. *Overseers of Kidderminster*, (1896) 2 Ch. 212, 220.

(*e*) *Gregg* v. *Arnott*, Ll. & G. t. Sugd. 246.

(*f*) *Lord Trimleston* v. *Hamill*, 1 Ba. & Be. 377.

(*g*) *Ward* v. *Carttar*, L. R. 1 Eq. 29; 25 Beav. 171.

(*h*) *Chambers* v. *Goldwin*, 9 Ves. 254, 291.

(*i*) *Lord Kensington* v. *Bouverie*, 7 De G. M. & G. 156; *Parkinson* v. *Hanbury*, L. R. 2 H. L. 1, distinguishing *Neesom* v. *Clarkson*, 2 Ha. 163. And see *O'Connell* v. *O'Callaghan*, 15 Ir. Ch. R. 31.

So where possession was taken under a forfeiture, and not as a mortgagee (*k*).

Receipt of profits by one co-owner mortgagee of patent.

Where the owner of a share in a patent had assigned his share by way of mortgage to the owner of another share, it was held that profits received by the mortgagee by working the patent were not profits received by him in that character, and that he was not liable to account for them as mortgagees in possession of the mortgaged share (*l*).

A foreclosure order does not of itself amount to taking possession (*m*).

Receipt of rent under attornment clause.

In taking an account in a foreclosure action, an attornment clause in the mortgage deed will not render the mortgagee chargeable as mortgagee in possession in favour of a subsequent incumbrancer in respect of the rent reserved by the attornment clause (*n*).

But a mortgagee who distrains under an attornment clause is a mortgagee in possession for the purpose of taking the accounts as between himself and subsequent incumbrancers (*o*).

Mortgagee cannot be compelled to take possession.

A mortgagee cannot be compelled to take possession; for he would thereby subject himself to the liability to account, which the Court will never force upon a mortgagee. Therefore he may bring an action for foreclosure without taking possession; but if he does take possession, he is bound to apply the rents and profits as the Court would apply them (*p*).

Collusive abandonment of proceedings.

A mortgagee will not be allowed to commence proceedings for obtaining possession, and then to abandon them collusively to the prejudice of the mortgagor or subsequent incumbrancers or creditors. In a case in which the mortgagee having brought ejectment, and then refused to take out execution, the Court ordered that, unless the mortgagee took out execution before the end of the term, he should be answerable for the profits, as in case of wilful default (*q*).

Relinquishment of possession does not determine liability.

A mortgagee who, by taking possession of the mortgaged property, has once assumed the responsibilities attaching to a mortgagee in possession, cannot rid himself of them at his

(*k*) *Blennerhassett* v. *Day*, 2 Ba. & Be. 104, 125.

(*l*) *Steers* v. *Rogers*, (1893) C. A. 232.

(*m*) *Re Loom*, (1910) 2 Ch. 230.

(*n*) *Stanley* v. *Grundy*, 22 Ch. D. 478.

(*o*) *Stockton Iron Co.*, 10 Ch. D. 335; *Exp. Harrison*, 18 Ch. D. 127.

(*p*) *Bulstrode* v. *Bradley*, 3 Atk. 582. See as to the application of rents and profits by the Court, *post*, Chap. LIV., Sect. V.

(*q*) *Duke of Buckingham* v. *Gayer*, 1 Vern. 257. See *Chapman* v. *Tanner*, 1 Vern. 266.

pleasure by relinquishing possession; and the Court will not, as a general rule, assist him so to do by appointing a receiver (*r*).

Satisfied mortgagee must deliver up possession.

vi.—**Delivery of Possession to Mortgagor on Redemption.**—A mortgagee, as soon as he is paid off, becomes a mere trustee, holding the legal estate for the benefit of the mortgagor or the next *puisne* incumbrancer of whose charge he has notice, who may require the reconveyance of the estate accordingly (*s*). A mortgagee, who has entered into possession, must therefore, so soon as the rents and profits received by him have fully satisfied the moneys due under his mortgage, including principal, interest, and costs, deliver up the property to the person entitled to possession of it (*t*).

A mortgagee cannot be compelled by the mortgagor or an assignee of the equity of redemption to quit possession except upon payment of principal, interest and costs, or so much thereof as has not been satisfied out of the rents and profits received (*u*); but as from the date when principal, interest and costs have been discharged, he will, until reconveyance, be liable as a rule to account with yearly rests (*x*).

Section III.

The Rights and Liabilities of a Mortgagee as to Possession of Title Deeds.

Mortgagee of fee should require delivery of deeds.

i. **Right of Mortgagee to Deeds Generally.**—Every mortgagee from a mortgagor professing to convey the fee, is entitled to expect the delivery of the deeds; and even where the mortgaged lands are part of a larger property, the owner of which retains the bulk of the deeds, the mortgagor has his own conveyance and a covenant for or acknowledgment of right to the production of the earlier deeds to deliver to his mortgagee.

(*r*) *Re Prytherch, Prytherch* v. *Williams*, 42 Ch. D. 590.

(*s*) *Quarrell* v. *Beckford*, 1 Madd. 269, at p. 278. See further as to reconveyance, *post*, Chap. LXI., Sect. I.

(*t*) *Wilson* v. *Metcalfe*, 1 Russ. 530; *Ashworth* v. *Lord*, 36 Ch. D. 545.

(*u*) *Brine* v. *Hartpole*, 15 Vin. Abr. 467, pl. 15; *Davy* v. *Barker*, 2 Atk. 2; *Postlethwaite* v. *Blythe*, 2 Swanst. 256.

(*x*) *Ashworth* v. *Lord*, 36 Ch. D. 545.

The possession of the deeds does not indeed prove that a person is owner in fee, as a tenant for life has a right to the deeds; but it authorizes the inference that there is no prior mortgage, as, had there been any, the mortgagee would have had the deeds (*y*); and, if they deduce an apparent title in fee, the only remaining risk of a serious character is that the owner may have incumbered his ownership in such a way as not to interfere with his right to retain the deeds; as, for instance, by making a settlement under which his interest is cut down to that of a tenant for life. Against this risk, the possession of the title deeds does not afford protection.

Legal mortgagee entitled to deeds.

It is a clear principle of law that the muniments of an estate belong to the person who has the legal interest in it (*z*). Accordingly a legal mortgagee in fee is entitled to the title deeds (*a*), as also a legal mortgagee of a life estate (*b*), but a termor is not entitled to the title deeds relating to the freehold, however long the term (*c*); a legal mortgagee of leaseholds is entitled to the lease and documents belonging to it (*d*).

Grantee of annuity.

The grantee of an annuity rarely has possession of the title deeds. Protection against grants of life annuities is afforded by registration (*e*).

Express grant of deeds.

Formerly, a mortgagee was not entitled to the title deeds unless the mortgage contained a grant of them or they were handed over to him (*f*), and it was the usual practice to insert in mortgage deeds, as in other conveyances of land, an express grant of the title deeds relating to the mortgaged property; but this practice has now fallen altogether into disuse in reliance upon the settled rule that a mortgagee, who is entitled to the deeds, can recover possession of them from a mortgagor who wrongfully retains them, or from any person to whom they may be delivered by the mortgagor so retaining them (*g*), unless, indeed, the mortgagee has lost such right by laches on his part.

(*y*) See as to priority between several incumbrancers as affected by possession of the deeds, *post*, Chap. LVIII., Sect. III. (ii).

(*z*) Per Best, C.J., in *Phillips* v. *Robinson*, 4 Bing. 106.

(*a*) *Smith* v. *Chichester*, 2 Dr. & War. 393.

(*b*) *Inf.* p. 837.

(*c*) *Austin* v. *Croome*, Car. & M. 653; *Wiseman* v. *Westland*, 1 Y. & J. 117; *Knight* v. *Knight*, 1 L. J. N. S. 125.

(*d*) *Hooper* v. *Ramsbottom*, 6 Taunt. 12; *Stokes* v. *Stokes*, W. N. (1886) 184.

(*e*) *Ante*, Chap. IV., Sect. III.

(*f*) *Davies* v. *Vernon*, 6 Q. B. 443.

(*g*) *Hooper* v. *Ramsbottom*, *sup.*; *Harrington* v. *Price*, 3 B. & Ad. 170.

Chap. XLII. § 3 (i.)

By the Conveyancing Act, 1881, s. 21 (7), it is enacted that at any time after the statutory power of sale has become exerciseable, the mortgagee may demand and recover from any person who has not priority over the mortgage any deeds which a purchaser under the power of sale would be entitled to demand and recover from the mortgagee (*h*).

Where there is a conflict as to priority between incumbrancers, the Court is bound to give effect to the legal right of the person who establishes his title and to order the deeds to be given up to him (*i*).

Right to retain deeds till payment.

A mortgagee is entitled to retain the deeds deposited with him until actual payment of his principal, interest and costs, and a tender though properly made and improperly rejected is not equivalent to payment so as to entitle an equitable mortgagor to recover the deeds by an action for detinue, the proper remedy of an equitable mortgagor being an action for redemption (*k*).

A legal mortgagee on being paid off is not bound to hand over the deeds or assign the estate to the mortgagor or his nominee if he has notice of a subsequent equitable mortgage (*l*).

For if the mortgagor pay the debt to the mortgagee without respect to an equitable claim against the latter of which he has notice, he may himself become liable to such claim (*m*).

But where part payment only is made the mere neglect to ask for production of the deeds will not fix the mortgagor with constructive notice of a sub-mortgage (*n*).

From what mortgagors a mortgagee will be entitled to demand delivery of deeds.

ii.—What Owners of Land are entitled to Custody of Title Deeds.—Having regard to the importance to a first mortgagee of obtaining from the mortgagor delivery of all documents of title relating to the mortgaged property which are or ought to be in the custody of the latter (*o*), it will be convenient in this place to indicate what estate or interest will entitle the owner thereof to have the possession and custody of title deeds.

(*h*) *Post*, Chap. XLV., Sect. II. (vii).

(*i*) *Re Cooper*, 20 C. D. 611; *Manners* v. *Mew*, 29 C. D. 725, 732; *Re Ingham*, (1893) 1 Ch. 352.

(*k*) *Bank of New South Wales* v. *O'Connor*, 14 App. Ca. 273. See *Rourke* v. *Robinson*, (1911) 1 Ch. 480.

(*l*) *Corbett* v. *National Provident Institution*, 17 T. L. R. 5.

(*m*) *Berwick* v. *Price*, (1905) 1 Ch. 632.

(*n*) *Ibid.*

(*o*) As to constructive notice of a prior incumbrance by absence of title deeds, and consequent loss of priority, see *post*, Chap. LVIII., Sect. III. (i).

The right to the custody of title deeds may thus be shortly stated:—

Right to custody of deeds.

The legal owner of property is entitled to the custody of the title deeds even though only a bare trustee (*p*).

Owner of first estate.

As a general rule, the custody belongs to the person who has the first estate of freehold, notwithstanding that there is a term for 1,000 years (*q*).

Tenant for life.

The legal tenant for life is entitled to the custody of the title deeds (*r*), and has a right to recover them from a contingent remainderman (*s*); and the tenant for life in custody of the deeds may, on a mortgage of his life estate, grant the custody of the deeds to the mortgagee (*t*), subject to the right of the remainderman to have them brought into Court if in danger (*u*).

Married woman tenant for life.

It was held that, where a wife was tenant for life, not for her separate use, the trustee in bankruptcy of the husband was not, as a matter of course, entitled to the custody of the title deeds; but that it was a matter for the discretion of the Court (*x*).

Equitable tenant for life.

Where a settlor vests real estate in trustees for himself for life with remainder over, the trustees have a right to the custody of the deeds, and if by negligence they allow the settlor to obtain them and so deal with the estate as owner, they will be personally responsible to the remaindermen for the consequences (*y*).

Where the tenant for life in equity is not a settlor, and therefore cannot, by suppressing the settlement, make a title to the fee simple, the Court has ordered the deeds to be delivered to the equitable tenant for life (*z*).

The powers conferred, and the duties imposed on an equitable tenant for life by the Settled Land Acts have raised a presumption in favour of his right to be let into possession of the settled land and consequently to custody of the title deeds, which previously did not exist; and, accordingly, an equitable tenant for life whose estate was determinable on bankruptcy or alienation, under a will which gave wide powers of management to the

(*p*) *Tendring Hundred Waterworks* v. *Jones*, (1903) 2 Ch. 615.
(*q*) *Austin* v. *Croome*, 1 C. & M. 653.
(*r*) *Garner* v. *Hannyngton*, 22 Beav. 627.
(*s*) *Allwood* v. *Heywood*, 1 H. & C. 745.
(*t*) Dav. Conv. vol. ii. pt. 2, p. 512.
(*u*) *Jenner* v. *Morris*, L. R. 1 Ch. 603; *Leathes* v. *Leathes*, 5 Ch. D. 571.
(*x*) *Exp. Rogers*, 26 Ch. D. 31, C. A.
(*y*) *Evans* v. *Bicknell*, 6 Ves. 174.
(*z*) *Lady Langdale* v. *Briggs*, 8 De G. M. & G. 391; *Re Burnaby's Settled Estates*, 42 Ch. D. 621.

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trustees, was held to be entitled to be let into possession of the land, and to have the custody of the title deeds (*a*). The same rule applies to a tenant for life subject to a term for the discharge of incumbrances (*b*).

Where an equitable tenant for life has mortgaged his interest, an order letting him into possession does not carry with it the right to the custody of the title deeds: the mortgagee can insist on their being retained by the trustees (*c*).

Remainderman.

The rule has been laid down that, if the remainderman can obtain the possession of the title deeds, he is entitled to hold them as against the tenant for life (*d*); but it may be doubted whether this rule would hold good at the present day, as the absence of the title deeds would seriously embarrass the tenant for life in the exercise and performance of his statutory powers and duties.

Discretion of Court as to custody of deeds of settled estates.

Where a suit has been instituted affecting settled estates, the custody of the deeds does not depend upon the question as to who has the legal right to them, but on the consideration as to what custody is most convenient for the purposes of the suit (*e*).

If, however, in such a case, the deeds are in the custody of the tenant for life in possession, the Court will not generally remove them from such custody unless there is danger to the safety of the deeds if left in the hands of the tenant for life, or unless the Court requires the deeds for the purpose of carrying out the trusts relating to the property (*f*); and it makes no difference that the tenant for life is abroad (*g*).

Rights of remainderman to inspection.

The right of a tenant for life, whether legal or equitable, to custody of title deeds, is subject to the right of the persons entitled to vested interests in remainder to production and inspection to a reasonable extent (*h*). But a remainderman whose interest is merely contingent has no such right (*i*).

Several owners.

Where several parties are interested, the custody is generally given to the persons who have the largest interest (*k*).

(*a*) *Re Wythes, West* v. *Wythes*, (1893) 2 Ch. 369.

(*b*) *Re Richardson*, (1900) 2 Ch. 778.

(*c*) *Re Newen, Newen* v. *Barnes*, (1894) 2 Ch. 297.

(*d*) *Foster* v. *Crabb*, 12 C. B. 136.

(*e*) *Stanford* v. *Roberts*, L. R. 6 Ch. 307.

(*f*) *Leathes* v. *Leathes*, 5 Ch. D. 221. See *Taylor* v. *Sparrow*, 4 Giff. 703; *Jenner* v. *Morris*, L. R. 1 Ch. 663.

(*g*) *Leathes* v. *Leathes*, *sup.*; notwithstanding *Warren* v. *Rudall*, 1 J. & H. 1, 14.

(*h*) *Davis* v. *Dysart*, 20 Beav. 405; *Pennell* v. *Dysart*, 25 Beav. 452.

(*i*) *Noel* v. *Ward*, 1 Madd. 322.

(*k*) *Elton* v. *Elton*, 27 Beav. 632.

Where the legal estate, whether of freeholds, copyholds, or leaseholds, is vested in a trustee or executor in trust, not for certain persons entitled in succession, but for *cestuis que trust* entitled absolutely in possession; the *cestuis que trust*, or if they are infants, their guardians, may institute proceedings to have the deeds delivered up to them (*l*).

Cestuis que trust absolutely entitled.

But as to leaseholds, and as to freeholds since the Land Transfer Act, 1897, a personal representative may hold the deeds until all debts have been paid and the personal estate cleared (*m*).

A tenant in fee simple or other person entitled to the custody of title deeds may maintain an action of trover or detinue for the deeds against any one who cannot show a better or as good a right to hold them (*n*).

Trover for deeds.

In a case where the title deeds of an estate, the reversion of which was in mortgage, were brought into the Master's office under a decree for administering the trusts of a will, the Court declined to make a stop order on the deeds on the petition of the mortgagee (*o*).

Equity will not aid mortgagee of reversion against tenant for life.

iii.—Liability of Mortgagee to produce Deeds.—As a general rule a mortgagee has no right to show to a stranger the title of his mortgagor, and, therefore, cannot be compelled to produce the title deeds in an action in the absence of the mortgagor (*p*).

Production of deeds by mortgagee.

A mortgagee may, however, be compelled to produce title deeds at the instance of a third party, who brings an action against the mortgagor with regard to his dealings with the equity of redemption (*q*).

On the other hand, if an action to which the mortgagee is not a party is brought against the mortgagor, who has taken copies of the title deeds, the mortgagor cannot object to produce the copies on the ground that production might prejudice the interest of the mortgagee in the estate and deeds (*r*); nor can he take advantage of the mortgagee's privilege and thereby avoid giving evidence of the contents of the mortgage (*s*).

Mortgagor must produce copies.

(*l*) Lewin, Trusts (12th ed.), 874.
(*m*) *Ibid.*
(*n*) *Easton* v. *London*, 33 L. J. Exch. 34; cf. *Bank of New South Wales* v. *O'Connor*, 14 App. Ca. 273.
(*o*) *Cotton* v. *Cotton*, 6 Beav. 96.
(*p*) *Lambert* v. *Rogers*, 2 Mer. 489.
(*q*) *Balls* v. *Margrave*, 3 Beav. 448; *S. C.*, 4 Beav. 119. See *Doe* v. *Roe*, 1 M. & W. 207.
(*r*) *Hercy* v. *Ferrers*, 4 Beav. 97.
(*s*) *Marston* v. *Downes*, 1 A. & E. 31.

Chap. XLII. § 3 (iii.)

Production in redemption and foreclosure action.

In a suit for redemption and foreclosure by a second mortgagee, the first mortgagee was compelled to produce bills of exchange and promissory notes (which were part of his evidence) for inspection (*t*).

In administration action.

In an action for the administration of the mortgagee's estate, his executors are bound to produce the title deeds to the *cestui que trust* (*u*).

Formerly mortgagee not compellable to produce deeds to mortgagor.

As regards mortgages made before the commencement of the Conveyancing Act, 1881, the rule is that the mortgagor or those claiming under him cannot compel the mortgagee to produce the title deeds for inspection (*x*). This rule is of general application (*y*), and holds good though the mortgagor required the production of the deeds for the purpose of enabling him to negotiate a loan, and so to pay off the mortgage; nor would the Court even have authorized the inspection of such deeds by the mortgagor when they had been deposited in Court in a suit instituted by the mortgagee for the execution of the trusts of the deed of conveyance (*z*).

So, also, the Court refused to order, at the instance of a remainderman, production of a settlement containing a power under which the mortgage was created (*a*).

Exception where mortgagor's solicitor is mortgagee.

An exception to the rule, however, was made where the mortgagee was solicitor to the mortgagor (*b*). And if fraud was charged and not expressly denied, or if there were suspicious circumstances (*c*), production of the documents affected by the fraud was enforced (*d*).

Deposit of deeds in Court.

If a mortgagee is a party to a suit and consent to a sale, he cannot refuse to deposit the title deeds in Chambers for the purpose of completing the sale (*e*); but for this purpose a party having leave to attend the proceedings is not a party to the action (*f*).

(*t*) *Gibson* v. *Hewett*, 9 Beav. 293. But see *Freeman* v. *Butler*, 33 Beav. 289.

(*u*) *Gough* v. *Offley*, 3 De G. & S. 653.

(*x*) *Senhouse* v. *Earl*, 2 Ves. Sen. 450; *Sparke* v. *Montriou*, 1 Y. & C. Ex. 103; *Schlenker* v. *Moxey*, 1 C. & P. 178; *Mills* v. *Oddy*, 6 C. & P. 728; *Carter* v. *Hubback*, 24 W. R. 354.

(*y*) *Gill* v. *Eyton*, 7 Beav. 155; *Greenwood* v. *Rothwell*, 7 Beav. 279; *Crisp* v. *Platel*, 8 Beav. 62; *Browne* v. *Lockhart*, 10 Sim. 420; *Owen* v. *Nickson*, 7 Jur. N. S. 497.

(*z*) *Damer* v. *Lord Portarlington*, 15 Sim. 380.

(*a*) *Chichester* v. *Marquis of Donegal*, L. R. 5 Ch. 497.

(*b*) *Davis* v. *Parry*, 4 Jur. N. S. 431.

(*c*) *Phillips* v. *Evans*, 2 Y. & C. C. C. 647.

(*d*) *Neate* v. *Latimer*, 4 Cl. & F. 570. See *Glover* v. *Hall*, 2 Ph. 484; *Bassford* v. *Blakesley*, 6 Beav. 131; *Kennedy* v. *Green*, 6 Sim. 6.

(*e*) *Livesey* v. *Harding*, 1 Beav. 343.

(*f*) *Armstrong* v. *Dickson*, (1911) 1 Ir. R. 435.

Where a mortgagee reconveys only part of the estate and is entitled to retain the title deeds, he is bound to enter into a covenant for their production (*g*), or an acknowledgment of the right to production substituted by statute for such production (*h*).

Rule where deeds relate to other property.

The provisions of the Conveyancing Act, 1881, s. 21, as to production of title deeds to anyone entitled to exercise the statutory power of sale are considered later (*i*).

Present law as to mortgagor's right to production.

With regard to mortgages made on or after the 1st January, 1882, the Conveyancing Act, 1881 (*k*), enacts as follows:—

Power for mortgagor to inspect title deeds.

Sect. 16.—"(1.) A mortgagor, as long as his right to redeem subsists, shall, by virtue of this Act, be entitled from time to time, at reasonable times, on his request, and at his own cost, and on payment of the mortgagee's costs and expenses in this behalf, to inspect and make copies or abstracts of or extracts from the documents of title relating to the mortgaged property in the custody or power of the mortgagee.

"(2.) This section applies only to mortgages made after the commencement of this Act, and shall have effect notwithstanding any stipulation to the contrary."

For the purposes of this enactment the expression "mortgagor" includes any person from time to time deriving title under the original mortgagor, or entitled to redeem a mortgage, according to his estate, interest, or right in the mortgaged property; and "mortgagee" includes any person from time to time deriving title under the original mortgagee (*l*).

General relief for loss of deeds.

iv.—Loss of Title Deeds.—Generally, relief may be obtained by persons claiming under missing instruments for the purpose of establishing estates or interests created by them whether actually contested or not (*m*), or to establish possession where a document of title is lost (*n*).

A suit in equity might have been instituted for payment or satisfaction of missing bonds or instruments, where the legal remedy would formerly have been unavailable or inadequate, or upon terms as to security or indemnity which the Courts of

(*g*) *Yates* v. *Plumbe*, 2 Sm. & G. 174.

(*h*) 44 & 45 Vict. c. 41, s. 9; *Re Pursell and Deakin*, W. N. (1893) 152.

(*i*) *Post*, Chap. XLV., Sect. II. (vii).

(*k*) 44 & 45 Vict. c. 41.

(*l*) *Ibid.* s. 2 (vi).

(*m*) *Hall* v. *Dawson*, 7 L. T. N. S. 519.

(*n*) *Walmsley* v. *Child*, 1 Ves. Sen. 344. See Story, § 84.

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common law could not formerly have considered (*o*). Under the present practice, relief in respect of lost instruments may be obtained in any Division of the High Court.

Mortgagee not deprived of remedies by loss of deeds.

A mortgagee is not deprived of his right to recover his debt by reason of his inability to produce the title deeds if the Court is satisfied that the money was actually advanced, and that the deeds have been lost; in such a case the amount of the debt, and the nature and terms of the security, may be proved by parol evidence (*p*). In order to render parol evidence admissible it is sufficient to prove that every reasonable search for the lost document has been made, and that it cannot be found (*q*).

Inquiry as to missing deeds.

If the mortgagee cannot produce the mortgage and title deeds or any of them by reason of their having been lost or stolen from him, the Court may, either in a foreclosure or redemption action, direct an inquiry what title deeds relating to the mortgaged premises were delivered to the mortgagee, and what has become of them (*r*).

Inquiry as to damages.

Any person entitled to the benefit of an undertaking for safe custody of documents may apply to the Court to assess damages for any loss, destruction or injury to the documents, and the Court may direct an inquiry as to the amount of the damages (*s*). But an acknowledgment confers no right to such damages (*t*).

Damages for loss of deeds set off against mortgage debt.

In case the title deeds are lost or destroyed by the mortgagee, though under alienation of mind, the expense of procuring fresh title deeds or copies, and the damage to the property caused by such destruction (upon which a reference will be directed) will be set off against the mortgage debt (*u*).

Suit for indemnity and compensation.

In such a case the mortgagor is warranted in instituting a suit against the mortgagee for redemption and a proper indemnity and compensation, in order that any person with whom he may thereafter deal respecting the property may be satisfied of the loss; and the Court will not consider whether he ought or

(*o*) *England* v. *Lord Tredegar*, L. R. 1 Eq. 344; *Bushnan* v. *Morgan*, 5 Sim. 635; *East Indian Co.* v. *Boddam*, 9 Ves. 464; *Whitfield* v. *Fausset*, 1 Ves. Sen. 387, 392.

(*p*) *Baskett* v. *Skeel*, 11 W. R. 1019.

(*q*) *Hart* v. *Hart*, 1 Ha. 1.

(*r*) *Stokoe* v. *Robson*, 3 V. & B. 51; *Hart* v. *Hart*, 1 Ha. 1; *Luccraft* v. *Hite*, cit. 2 Ha. 14; *Bentinck* v. *Willink*, 2 Ha. 1.

(*s*) Conv. Act, 1881, s. 9 (10).

(*t*) *Ibid.* s. 9 (6).

(*u*) *Hornby* v. *Matcham*, 16 Sim. 325; *Woodman* v. *Higgins*, 14 Jur. 846; *Baskett* v. *Skeel*, 11 W. R. 1019.

not to have accepted any of the proposals which were made to him by the mortgagee on that head (*x*).

There is no implied covenant on the part of the mortgagee to take reasonable care of the title deeds during the continuance of the security. The cases in which indemnity and compensation have been decreed to mortgagors for loss of title deeds by mortgagees are not founded on the hypothesis of an implied covenant but are referable to the ancient jurisdiction of Courts of equity to give relief in cases of accident (*y*).

Extent of indemnity and compensation.

The indemnity should extend to any such costs, damages, and expenses as the mortgagor or other party may be put to by the loss of the instrument (*z*).

Measure of compensation.

The measure of compensation when title deeds have been lost by a mortgagee is the expense of office copies, &c. to which the estate will be put by reason of the decree and other proceedings forming part of the title (*a*); and does not include speculative damages for injury by the absence of the deeds at a sale (*a*).

Repayment.

Money that has been paid to the mortgagee by the mortgagor, in obedience to the terms of an order for an injunction, for interest accrued on the mortgage debt from the time the notice to redeem expired, will be decreed to be repaid (*b*).

Costs.

In such a suit subsequent incumbrancers are entitled to their costs, though the proceeds of sale are not sufficient to pay the first incumbrancer (*c*).

The mortgagee must pay the costs of an action brought by him against the mortgagor, when the redemption of the property is only impeded by the loss of the title deeds by the mortgagee (*d*). And generally, where the loss arises through the fault of the mortgagee, he will be liable for the costs occasioned by the loss (*e*).

Loss of deeds through no fault of mortgagee.

If the mortgagee had been robbed of the title deeds without negligence, it would seem that he would not have been respon-

(*x*) *Lord Midleton* v. *Eliot*, 15 Sim. 531; *Brown* v. *Sewell*, 11 Ha. 49; *Bentinck* v. *Willink*, 2 Ha. 1; *Hornby* v. *Matcham*, *sup.*; *Luccraft* v. *Hite*, 2 Ha. 14, n.

(*y*) *Gilligan* v. *National Bank*, (1901) 2 Ir. R. 513.

(*z*) *East India Co.* v. *Boddam*, 9 Ves. 464; *Lord Midleton* v. *Eliot*, *sup.*

(*a*) *Brown* v. *Sewell*, 11 Ha. 49; *Hornby* v. *Matcham*, 15 Sim. 325.

(*b*) *Lord Midleton* v. *Eliot*, 15 Sim. 531.

(*c*) *Wontner* v. *Wright*, 2 Sim. 543.

(*d*) *Lord Midleton* v. *Eliot*, 15 Sim. 536.

(*e*) *Price* v. *Price*, 15 L. J. Ch. 13; *James* v. *Rumsey*, 11 Ch. D. 398.

sible (*f*) further than to be obliged to give an indemnity (*g*). So, if they were lost notwithstanding due care (*h*).

Deeds otherwise not forthcoming.

Where, in a redemption action brought by a second mortgagee, the deeds were not forthcoming in consequence of having been lost by the solicitor of the first mortgagee, the second mortgagee was decreed an indemnity with costs, but not compensation, as he had made no case for it (*i*).

Where the deeds were not forthcoming, in a suit by a mortgagee suing in right of his wife as administratrix, in consequence of a claim by her solicitor to hold them adversely, the money was paid into the bank to remain until the deeds could be secured and a reconveyance had (*k*).

Mortgagee not liable for deeds delivered to his solicitor without his privity.

No liability will attach to a mortgagee for the loss of documents of title deposited by way of security for a loan with the mortgagee's solicitor if in fact the mortgagee never intended that such documents should form part of the security, and did not know that the mortgagor had deposited them for that purpose (*l*).

Section IV.

Alienation of the Security.

Assignments of mortgage debts and securities for the same.

i.—Transfer of Mortgage.—A mortgagee may assign the mortgage debt and the securities for the same to another person either by way of absolute transfer or by way of sub-mortgage (*m*).

Concurrence of mortgagor not necessary to transfer of mortgage.

For the purpose of such assignment, the concurrence or consent of or notice to the mortgagor is not necessary (*n*); but no person should advance his money upon the security of a transfer of a mortgage unless either the mortgagor is a party

(*f*) *Jones* v. *Lewis*, 2 Ves. Sen. 240. See *Smith* v. *Bicknell*, 3 V. & B. 51, n.; *Job* v. *Job*, 6 Ch. D. 563.

(*g*) *Shelmardine* v. *Harrop*, 6 Madd. 39; *Stokoe* v. *Robson*, 19 Ves. 385; *James* v. *Rumsey*, *inf.*

(*h*) *Woodman* v. *Higgins*, 14 Jur. 846.

(*i*) *James* v. *Rumsey*, 11 Ch. D. 398. See *Caldwell* v. *Matthews*, 62 L. T. 799.

(*k*) *Schoole* v. *Sall*, 1 Sch. & L. 176. See, as to solicitors' lien on deeds, *post*, Chap. LIX., Sect. IV. (vi).

(*l*) *Rhodes* v. *Moules*, (1895) 1 Ch. 236, C. A.

(*m*) As to sub-mortgages, see *post*, pp. 856 *et seq.*

(*n*) *Jones* v. *Gibbon*, 9 Ves. 407, 411.

or, otherwise, without an admission by the mortgagor, or strict proof that the state of account between the transferring mortgagee and the mortgagor is as stated by the former; for the transferee's rights are subject to the state of account between the mortgagor and mortgagee at the date of the assignment (*o*), and he cannot stand in a better position than the original mortgagee (*p*), and can only claim what is owing on the security on the footing of such equities and settlements of accounts as would bind the original mortgagee (*q*), and whatever the mortgagor could have claimed against the mortgagee, for example, by way of set-off, he can claim equally against the transferee (*r*). The mortgagor not concurring in the assignment is not bound by the amount appearing due on the face of the assignment (*s*). And the fact that the transferee has obtained the legal estate in the property without notice will not help him to set up a claim for more than was actually due on the mortgage at the time of the transfer (*t*).

Payment to mortgagee after transfer.

Where a mortgage has been transferred, a payment made by the mortgagor to the original mortgagee without collusion is good as against the transferee, provided the mortgagor has no notice of the transfer. But his solicitor's knowledge of the transfer may be imputed to the mortgagor so as to prevent him from justifying his payment to the original mortgagee (*u*).

Mortgagor not bound by accounts between mortgagee and assignee.

The mortgagor not being bound by the settlement of account between the mortgagee and assignee, *à fortiori* he cannot be prejudiced by any agreement between them to increase the amount of the principal due; and, consequently, the arrears of interest at the time of the assignment cannot, generally speaking, without his concurrence, be converted into principal and added to the mortgage debt (*x*). And even with his consent, the interest cannot be converted into principal to the prejudice

(*o*) *Bickerton* v. *Walker, inf.; Dixon* v. *Winch, inf.*

(*p*) *Ashenhurst* v. *James,* 3 Atk. 270.

(*q*) *Earl of Macclesfield* v. *Fitton,* Vern. 169; *Matthews* v. *Wallwyn,* 4 Ves. 118; *Williams* v. *Sorrell,* 4 Ves. 389; *Bradwell* v. *Catchpole,* 3 Swanst. 79, n.

(*r*) *Turner* v. *Smith,* (1901) 1 Ch. 213.

(*s*) *Williams* v. *Sorrell, sup.; Chambers* v. *Goldwin,* 9 Ves. 254.

(*t*) *Bradwell* v. *Catchpole,* 3 Swanst. 78, n.; *Turner* v. *Smith,* (1901) 1 Ch. 213. But see *Dixon* v. *Winch,* (1900) 1 Ch. 736, C. A.

(*u*) *Dixon* v. *Winch,* (1900) 1 Ch. 736. See *Turner* v. *Smith, sup.;* and cf. *Berwick* v. *Price,* (1905) 1 Ch. 632.

(*x*) *Earl of Macclesfield* v. *Fitton,* Vern. 169; *Ashenhurst* v. *James,* 3 Atk. 271; *Agnew* v. *King,* (1902) 1 Ir. R. 471.

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of other creditors having then a charge on the estate of which the parties have notice (*y*). Nor can the rate of interest be changed. But it is submitted that as equity will, on the settlement of accounts, allow the necessary costs of defending and maintaining the title (*z*), renewal of leases (*a*), and the like, with interest in the meantime, the amount of such costs may on an assignment be added to the principal, and will carry interest without the mortgagor's concurrence, and have preference to other subsisting charges.

Mortgagor may set off payments to mortgagee after assignment.

The rule that a mortgagor not concurring in the assignment is not bound thereby may be considered as settled, not only with respect to payments made before the assignment, but also to payments made thereafter, or on a running account. The mortgagor would be at liberty to set off all moneys paid to the mortgagee after the assignment and before notice (*b*), but not payments to the solicitor of the mortgagee, unless he has a special authority to receive the money (*c*).

Mortgagor's concurrence dispenses with necessity of making original mortgagee party to redemption action.

Moreover, where the mortgagor concurs in the assignment, the original mortgagee need not be made a party to an action of redemption, which otherwise may be the case, that he may account for the profits received in his time (*d*).

Assignment by mortgagee in possession.

There is another most important point to be attended to by the mortgagee in an assignment of mortgage, viz., that if he is in possession, he is considered in equity, in some measure, in the light of a trustee, and accountable for the profits; and, therefore, if without the assent of the mortgagor he voluntarily assigns over the mortgage to another, he will be held liable to account for the profits received subsequently to the assignment (*e*), on the principle that, having turned the mortgagor out of possession, it is incumbent on him to take care in whose hands he places the estate. A query is added in Equity Cases Abridged (*e*), whether, if the mortgagor hides, so that he cannot be served with a *subpœna*, the mortgagee in possession may

(*y*) *Digby* v. *Craggs*, Amb. 612; 2 Ed. 200; *Montague* v. *Ratcliffe*, Fonb. Eq. (5th ed.) vol. ii. p. 438.

(*z*) *Godfrey* v. *Watson*, 3 Atk. 518.

(*a*) *Lucan* v. *Mertins*, 2 Atk. 4; *Manlove* v. *Bale*, 2 Vern. 84.

(*b*) *Jones* v. *Gibbon*, 9 Ves. 410; *Allen* v. *Lord Southampton*, *Banfather's Case*, 16 Ch. D. 187; *Bickerton* v. *Walker*, 31 Ch. D. 151, 158; *Dixon* v. *Winch*, (1900) 1 Ch. 736, C. A.

(*c*) *Withington* v. *Tate*, L. R. 4 Ch. 288.

(*d*) 2 Eq. Ca. Abr. 594; *Hill* v. *Adams*, 2 Atk. 39. See *Norrish* v. *Marshall*, 5 Madd. 475.

(*e*) 2 Eq. Ca. Abr. 328, pl. 2. And see *ante*, p. 828.

not assign without being accountable for the subsequent profits; but the query only tends to show the general rule.

Where, however, a mortgagee in possession transfers the security by direction of the Court in a redemption suit the mortgagor will be bound though he does not concur in the transfer, and the original mortgagee will be under no continuing liability for the subsequent rents or the acts and defaults of the transferee (*f*).

For the reasons above mentioned, the concurrence of the mortgagor in the assignment of a mortgage should, if possible, never be dispensed with; and in cases in which, from unavoidable circumstances, an assignment is taken from the mortgagee only, the precaution should be taken of obtaining a covenant from the mortgagee, that the money alleged to be owing is actually due; and notice of the assignment should be given to the mortgagor with the least practicable delay.

Assignment of void or voidable mortgage.

If there be fraud in the original creation of the mortgage, as for example, if no money actually pass between the parties, and if the mortgagee afterwards assign to a third person for a valuable consideration, without notice of the fraud in the original transaction, and the mortgagor convey his equitable interest to a stranger for a valuable consideration without notice of the mortgage, the money paid on the assignment will make good the original transaction and purge the fraud (*g*).

But the transferee is in no better position than the mortgagee when the mortgage is absolutely void from the beginning, although he took for valuable consideration and without notice (*h*); but where the security is only voidable, it may become valid in the hands of such a transferee (*i*).

How far legal estate protects transferee from equities affecting the property.

The transferee of a mortgage will not be protected by obtaining the legal estates thereby conveyed from being postponed to any equities affecting the property of which he had actual or constructive notice at the time of the transfer (*k*). So, where land was devised subject to legacies, and a mortgage of the land was made by the devisee expressly subject to the

(*f*) *Hall* v. *Heward*, 32 Ch. D. 430, C. A.

(*g*) *Newport's Case*, Ca. t. Holt, 477.

(*h*) *Parker* v. *Clarke*, 30 Beav. 54; *Ogilvie* v. *Jeaffreson*, 2 Giff. 353.

(*i*) *Judd* v. *Green*, 33 L. T. 597. See *George* v. *Milbanke*, 9 Ves. 190; *Lord Aldborough* v. *Trye*, 7 Cl. & F. 436, 463.

(*k*) See further, as to actual and constructive notice, *post*, Chap. LVIII., Sect. II. (v).

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legacies, and on the money being called in by the mortgagee a transfer was made to a third party with a confirmation by the mortgagor, to whom a further advance was made, but the transfer was not expressed to be made subject to legacies, the party advancing the money being falsely informed of their being satisfied, yet he took subject to the legacies, as by the conveyance he had gained only the same estate as was held by the original mortgagee (*l*).

So where, by means of a forged receipt, a vendor fraudulently represents that an equitable mortgage has been paid off, the purchaser, though he has the legal estate and possession of the title deeds, is not entitled to hold the property free from the equitable mortgage, but takes subject to it (*m*).

The assignee of a contract or chose in action, or equitable security, takes it subject to all equities arising upon it (*n*).

Payment of consideration for transfer.

A transferee should be careful to pay the consideration money into the hands of the transferor or his solicitor, whose production of the deed of transfer and of a receipt signed by the transferor, or a statement that the consideration has been paid, is sufficient authority for payment to the solicitor (*o*).

Payment to mortgagee's solicitor.

Where the plaintiff, who had mortgaged certain lands, was informed by his solicitor, contrary to fact, that the mortgagee had demanded to be paid off, and had accordingly authorized the solicitor to borrow the money on his behalf from the defendant; and in pursuance of that arrangement, the mortgagor executed a deed of transfer and also a bond for the amount; the solicitor who acted also for the defendant handed over to the latter the bond, but retained the deed of transfer, which was not even brought to the notice of the original mortgagee, and subsequently absconded; the defendant then sued the plaintiff on the bond at law, and recovered; the plaintiff then filed his bill in equity to get back the amount; it was held, that the loss must be borne by the defendant, who was ordered to repay to the plaintiff the amount recovered on the bond with interest (*p*).

So, where the transferee's solicitor, who was also one of three mortgagees, received the money from his client, and prepared a transfer which was signed by himself and one of his co-

(*l*) *Rogers* v. *Rogers*, 6 Sim. 364.

(*m*) *Jared* v. *Clements*, (1903) 1 Ch. 428, C. A.

(*n*) *Lickbarrow* v. *Mason*, 2 T. R. 63; *Mangles* v. *Dixon*, 3 H. L. C. 702.

(*o*) 44 & 45 Vict. c. 41, s. 56; *Rimmer* v. *Webster*, (1902) 2 Ch. 163.

(*p*) *Young* v. *Guy*, 8 Beav. 147.

mortgagees, and by the mortgagor, but the money was never paid, and was lost by the solicitor's insolvency; it was held that the deed was inoperative as against the transferors and the mortgagor, and a reconveyance was ordered (*q*).

Purchase of incumbrance at under-value.

If the assignee become the purchaser of an incumbrance for less than its actual value, he will, as against the mortgagor or his heirs (*r*), be entitled to require payment of the full debt.

It has been questioned whether, as against a *bonâ fide* purchaser of the estate, without notice of the incumbrance (*s*), or as against subsequent creditors (*t*), the purchaser, being a stranger, could require payment of more than he actually paid.

And in another case (*u*), it is stated to have been determined by the Court that an heir or any other should not, as against a real purchaser, be allowed more on any incumbrance bought in than what he actually paid for the same, without regard to what was really due on such incumbrance.

It is, however, now clear that a mortgagee (*x*) or other creditor purchasing in an incumbrance for less than its value, shall be entitled as against intermediate incumbrancers, or others over whose charges or equities the purchased incumbrance ranks in priority, to recover the full amount of the debt (*y*); and, notwithstanding doubts, it would seem that a stranger, purchasing an incumbrance for less than the amount due, will be entitled to the full benefit of his purchase as against incumbrancers, creditors, or purchasers for value, over whose interests the purchased security has priority, no less than as against the mortgagor and his heirs. So, in the anonymous case in Salkeld, it is stated, that "if one acts for himself, and being not in the circumstances of a trustee or executor, buy in a mortgage for less than is due, or for less than it is worth, he shall be allowed all that is due on the mortgage, for he stands in the place of him that assigned, viz., the mortgagee, who might have given it to him *gratis*, and what is due

(*q*) *Griffin* v. *Clowes*, 20 Beav. 61.

(*r*) *Phillips* v. *Vaughan*, 1 Vern. 336; *Williams* v. *Springfield*, 1 Vern. 476; *Baker* v. *Kellett*, 3 Rep. in Ch. 23; *Anon.*, 1 Salk. 155; *Ascough* v. *Johnson*, 2 Vern. 66.

(*s*) *Phillips* v. *Vaughan*, 1 Vern. 336.

(*t*) *Williams* v. *Springfield*, 1 Vern. 476.

(*u*) *Long* v. *Clopton*, 1 Vern. 464.

(*x*) *Shaw* v. *Bunny*, 2 De G. J. & S. 468, 472; *Dobson* v. *Land*, 8 Ha. 220; *Kirkwood* v. *Thompson*, 2 H. & M. 401; 2 Dav. Conv. (4th ed.), vol. ii. pt. ii. p. 272.

(*y*) *Morret* v. *Paske*, 2 Atk. 54; *Darcy* v. *Hall*, 1 Vern. 49. And see *Bromley* v. *Holland*, 5 Ves. 620, n.

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must be the measure of our allowance, and not what he gave, for that might have been more than it is worth, as well as less, and since he runs the hazard if loss happens, he ought to have the benefit in case it turns to advantage; so said and admitted, per Cowper, Lord Chancellor" (*z*). These remarks apply as much to a stranger as to a creditor.

Purchase by person in fiduciary position.

If, however, the purchaser stands in a fiduciary position to the mortgagor, then the Court will hold that he made the purchase for the benefit of the estate.

Agent or trustee, &c.

An agent, trustee, heir-at-law, executor, or guardian, purchasing a puisne incumbrance, shall, as against another incumbrancer, be paid no more than what he gave for this incumbrance; otherwise as to a prior creditor, who *bonâ fide* buys in the puisne incumbrance, though he did not give the full value for it (*a*).

Solicitor.

The rule was applied against a solicitor (*b*) and a solicitor's clerk who, by means of knowledge acquired by him while acting in that capacity, was enabled to purchase a mortgage for less than its value (*c*).

Heir-at-law.

So, if the heir-at-law is the purchaser, and there are judgment or specialty creditors, he shall not have the benefit of the assignment beyond the amount of the purchase to their prejudice (*d*).

Tenant for life.

It seems that if a tenant for life buy in a mortgage affecting the inheritance for a less sum than is really due upon it, he is entitled to charge as against the inheritance merely the sum which he has actually paid for the incumbrance, and that the purchase will be considered as having been made for the benefit of the inheritance (*e*). So, too, where a tenant for life purchases from a mortgagee under a power of sale (*f*).

Guardian of infant.

The same rule applies to the case of a guardian buying in an incumbrance charged on the estate of the infant for less than its value, of which the infant will have the advantage (*g*).

(*z*) *Anon.*, 1 Salk. 155.

(*a*) *Morret* v. *Paske*, 2 Atk. 54. And see *Brathwaite* v. *Brathwaite*, 1 Vern. 335; *Anon.*, 2 Vent. 353; *Lancaster* v. *Evors*, 1 Ph. 349, 355; *Carter* v. *Palmer*, 8 Cl. & F. 657.

(*b*) *Nelson* v. *Booth*, 3 Jur. N. S. 950.

(*c*) *Hobday* v. *Peters*, 28 Beav. 349.

(*d*) *Brathwaite* v. *Brathwaite*, 1 Vern. 335; *Long* v. *Clopton*, 1 Vern. 464; *Lancaster* v. *Evors*, 1 Ph. 349, 355. And the same seems now, since the 3 & 4 Will. IV. c. 104, to apply to a simple contract creditor.

(*e*) *Hill* v. *Browne*, Dru. 426, 433.

(*f*) *Griffith* v. *Owen*, (1907) 1 Ch. 195.

(*g*) *Powell* v. *Glover*, 3 P. Wms. 251, note.

Directors of an insolvent company purchasing its debentures, at an undervalue, were not allowed to prove for the full amount, but only the amount paid with interest (*h*).

Directors of company.

A surety compounding the debt for a smaller sum, cannot, as against the principal debtor, stand as a creditor for the full amount (*i*).

Surety.

A trustee or other person standing in a fiduciary position will not be allowed the benefit of his purchase as against his *cestuis que trust* or principal after he had ceased to fill any of the above characters, unless after full communication made by him of all the information he gained while he filled such character, and with the full knowledge and consent of his *cestuis que trust* or principal (*k*).

Purchase after termination of fiduciary position.

The rule does not seem, however, to extend to a tenant in common, as there is no fiduciary relation between him and his co-tenants (*l*).

Tenant in common.

The rule is not applicable to a trustee or agent, where the debtor acquiesces (*m*).

Consent of *cestuis que trust*.

If the *cestuis que trust* for a long time refuse to adopt the purchase, the trustee may keep it (*n*).

As to purchases of incumbrances at an undervalue by persons in a fiduciary position, if the mortgage is purchased for the purpose of protecting a subsequent incumbrance to which they are entitled in their own right, they may take the full benefit of the prior security (*o*).

Cases where trustees, &c. may have full benefit of security.

The heir was allowed the full benefit of his purchase against an incumbrancer, a solicitor, who advised the purchase as a provision for the heir (*p*).

So the devisee of the reversion, being also second incumbrancer, was allowed the full benefit (*o*).

In bankruptcy the purchaser is entitled to a dividend on the full amount (*q*).

According to the usual practice, a transfer of a mortgage consists of an absolute assignment of the debt, and the benefit

Form of deed of transfer of mortgage.

(*h*) *Re Imperial Land Co. of Marseilles*, 4 Ch. D. 566, C. A.

(*i*) *Reed* v. *Norris*, 2 My. & Cr. 361.

(*k*) *Carter* v. *Palmer*, 8 Cl. & F. 657. And see 3 Sug. V. & P. (11th ed.) p. 895.

(*l*) *Kennedy* v. *De Trafford*, (1897) A. C. 180.

(*m*) *Crompton* v. *Huber*, 1 Jur. N. S. 465.

(*n*) *Barwell* v. *Barwell*, 34 Beav. 371.

(*o*) *Davis* v. *Barrett*, 14 Beav. 542.

(*p*) *Bailey* v. *Wilkins*, 3 J. & L. 630. And see *Barton* v. *Hassard*, 3 Dr. & War. 461.

(*q*) *Wilkinson* v. *Slee*, 12 W. R. 848.

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of all securities for the same, and of a conveyance of the mortgaged property with the powers and subject to the equity of redemption subsisting by virtue of the original mortgage.

Power of attorney now not necessary.

At law, the debt being a chose in action, was not, in general, before the Judicature Act, 1873, assignable, a power of attorney being necessary to enable the assignee to proceed in the mortgagee's name on the covenant. But now such a power is no longer necessary, as assignees of legal choses in action are by that Act (*r*) empowered to sue in their own names, and to give good discharges without the concurrence of their assignors, provided the debtor or other person liable has notice of the assignment (*s*).

Benefit of securities pass by assignment of debt.

If the deed of transfer refer in terms to the mortgage, the assignment of the debt will pass the benefit of the securities, though not expressly mentioned (*t*).

Arrears of interest.

If, upon the transfer of a mortgage, the transferee pays to the transferor arrears of interest as well as the amount of the principal, such arrears will be recoverable by the transferee from the mortgagor, though not expressly mentioned in the assignment (*u*). And if the mortgagor joins in the transfer, the transferee is entitled to treat such arrears as principal bearing interest (*x*).

Conveyance of mortgaged property.

The form of conveyance in a deed of transfer and the rights of the transferee thereunder will depend upon the nature of the property conveyed.

Arrears of rent do not pass.

A conveyance of land by way of transfer of mortgage, without express words as to rents in arrear, will not pass to the transferee arrears of rent accrued prior to the transfer (*y*).

Debt passes by conveyance.

The conveyance of the estate will of itself pass the debt to the transferee, though there be no express assignment of the debt; for the estate being absolute at law, the debtor has no means of redeeming it but by paying the money; therefore, he who has the estate has in effect the debt, as the estate can never be taken from him, except by payment of the debt (*z*).

Transfer of mortgage of copyholds.

In the case of a transfer of mortgage of copyholds, so long as the transaction between the mortgagor and mortgagee rests

(*r*) 36 & 37 Vict. c. 66, s. 25 (6).
(*s*) *Ante*, p. 321.
(*t*) *Exp. Smith*, 2 D. & C. 271.
(*u*) *Cottrell* v. *Finney*, L. R. 9 Ch. 541.
(*x*) *Agnew* v. *King*, (1902) 1 Ir. R. 471.
(*y*) *Salmon* v. *Dean*, 3 Mac. & G. 344.
(*z*) *Jones* v. *Gibbon*, 9 Ves. 407, 411.

in covenant, if the mortgagee assign his equitable interest by deed, and the mortgagor surrender to the assignee, the latter may compel the lord by *mandamus* to admit him without a double fine (*a*).

Where a mortgage of copyholds has been effected in the usual way by conditional surrender, the transfer of the estate (if required) must be effected, either by means of an entry of satisfaction of the original mortgage immediately followed by a fresh conditional surrender by the mortgagor to the use of the transferee, or by the mortgagee being admitted and surrendering to the use of the transferee, subject to the equity of redemption of the mortgagor (*b*).

Power of sale.

It is usual and advisable that a transfer of a mortgage should expressly refer to and include the express or statutory power of sale contained in or implied by virtue of the mortgage (*c*); but it would seem that all powers and remedies, though not mentioned, would pass (*d*).

Partial transfer of mortgage debt.

There is an obvious difficulty in effecting a transfer of part of a mortgage debt, as the mortgagee's remedies by sale, foreclosure, &c. are indivisible, so as not to admit of a partial transfer; but such an arrangement may be carried out in effect either by the mortgagee retaining his estate in and powers and remedies over the mortgaged property, or by a transfer of the debt and property to a trustee for the original mortgagee and the party paying the amount; in either case the mortgagee or the trustee, as the case may be, will execute a declaration of trust that he holds the mortgage money and interest, and the securities for the same, upon trust for the mortgagee and the third party according to the amounts to which they are entitled respectively; the declaration should state whether the amounts are to rank *pari passu*, or whether one is to be paid in full in priority to the other. A sub-mortgage, however, should generally be used in preference to a transfer of part of the mortgage debt (*e*).

New proviso for redemption.

It is generally considered that the introduction of a new proviso of redemption in the assignment of a mortgage is not

(*a*) *Rex* v. *Lord of the Manor of Hendon*, 2 T. R. 484. See 1 Scriv. Cop. (4th ed.) p. 211.

(*b*) 2 Dav. Conv. vol. ii. pt. 2, p. 793.

(*c*) *Curling* v. *Shuttleworth*, 6 Bing. 121; *Young* v. *Roberts*, 15 Beav. 558.

(*d*) *Boyd* v. *Petrie*, L. R. 7 Ch. 385.

(*e*) Dav. Conv. vol. ii. pt. 2, p. 808; Key & Elph. (9th ed.) vol. ii. p. 221.

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sufficient to constitute a new mortgage. In one case, however, where the mortgagee assigned a part of the mortgage debt, and joined with the heir of the mortgagor in conveying part of the mortgaged lands to a new mortgagee, with a new proviso and at a new rate of interest, and with a bond and covenant, it was held that the transaction constituted a new mortgage (*f*).

Voluntary assignment of mortgages.

A voluntary deed of assignment by a mortgagee of all his debts and personal estate, with a grant generally of all the estates held by him by way of mortgage, but not specifying the particular lands, and without delivery of the mortgage deed, or notice to the mortgagor, will not be aided in equity, if the deed be inoperative at law, though there be a covenant for further assurance (*g*). But at law, a general assignment by A. of all his personal estate and effects to trustees, has been held to pass a mortgage of leaseholds (*h*).

By the Conveyancing Act, 1881 (*i*), it is enacted—

Forms of statutory transfer of mortgage.

Sect. 27. "(1.) A transfer of a statutory mortgage may be made by a deed expressed to be made by way of statutory transfer of mortgage, being in such one of the three forms (A.) and (B.) and (C.) given in Part II. of the Third Schedule to this Act as may be appropriate to the case, with such variations and additions, if any, as circumstances may require, and the provisions of this section shall apply thereto.

"(2.) In whichever of those three forms the deed of transfer is made, it shall have effect as follows (namely):

"(i.) There shall become vested in the person to whom the benefit of the mortgage is expressed to be transferred, who, with his executors, administrators, and assigns, is hereafter in this section designated the transferee, the right to demand, sue for, recover, and give receipts for the mortgage money, or the unpaid part thereof, and the interest then due, if any, and thenceforth to become due thereon, and the benefit of all securities for the same, and the benefit of and the right to sue on all covenants with the mortgagee, and the right to exercise all powers of the mortgagee:

"(ii.) All the estate and interest, subject to redemption, of the mortgagee in the mortgaged land shall vest in the transferee, subject to redemption.

"(3.) If the deed of transfer is made in the form (B.), there shall also be deemed to be included, and there shall by virtue of this Act be implied therein, a covenant with the transferee by the person expressed to join therein as covenantor to the effect following (namely):

(*f*) *Barham* v. *Earl of Thanet*, 3 My. & K. 607.

(*g*) *Ward* v. *Audland*, 8 Beav. 201.

(*h*) *West* v. *Stewart*, 14 M. & W. 47.

(*i*) 44 & 45 Vict. c. 41.

"That the covenantor will, on the next of the days by the mortgage deed fixed for payment of interest, pay to the transferee the stated mortgage money, or so much thereof as then remains unpaid, with interest thereon, or on the unpaid part thereof, in the meantime, at the rate stated in the mortgage deed; and will thereafter, as long as the mortgage money, or any part thereof, remains unpaid, pay to the transferee interest on that sum, or the unpaid part thereof, at the same rate, on the successive days by the mortgage deed fixed for payment of interest.

"(4.) If the deed of transfer is made in the form (C.), it shall, by virtue of this Act, operate not only as a statutory transfer of mortgage, but also as a statutory mortgage, and the provisions of this section shall have effect in relation thereto accordingly; but it shall not be liable to any increased stamp duty by reason only of it being designated a mortgage."

The statutory transfer is available only where the mortgage is also statutory. Therefore in a non-statutory transfer of a mortgage of leaseholds made by sub-demise a conveyance of the "benefit of the said mortgage" without more will not pass the legal estate (*k*).

The words "on the next of the days" in the implied covenant in sub-sect. 3 are equivalent to a covenant by the transferee not to sue until then (*l*).

Joint and several covenants.

By sect. 28, in a statutory transfer of mortgage the implied covenants of several joint transferors will be deemed to be joint and several; and if there are several transferees the benefit of such covenants will enure to them jointly, as in the case of a statutory mortgage (*m*).

Form of transfer of mortgage to trustees.

The transfer of mortgages on a change of trustees has been simplified. If the mortgaged property was freehold, it was formerly conveyed to a releasee to the use of the continuing and a new trustee. If the mortgage was of personalty, two deeds were formerly necessary; but this necessity has been removed by Lord St. Leonards' Act (*n*), which enacts that any person shall have power to assign personal property now by law assignable, including chattels real, directly to himself and another person or other persons, or corporation, by the like means as he might assign the same to another. This enactment does not apply to choses in action, but now choses in action, as well as free-

(*k*) *Re Beachey*, (1904) 1 Ch. 67.

(*l*) *Bolton* v. *Buckingham*, (1891) 1 Q. B. 278. As to the effect on the liability of a surety, see *ibid.*; and *Bolton* v. *Salmon*, (1891) 2 Ch. 48.

(*m*) See this section set out *ante*, p. 152.

(*n*) 22 & 23 Vict. c. 35, s. 21.

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holds, may be conveyed by a person to himself jointly with another person by the like means by which they might have been conveyed by him to another person (*o*).

Transfer of security by deposit of deeds.

A transfer of a security by a deposit of deeds may be effected by a simple delivery of the deeds to the transferee without any memorandum. Where a solicitor paid off a debt of his client which was secured by deposit of deeds, and took possession of and retained the deeds, it was held that he took them as transferee of the security so as to exclude his lien for costs (*p*).

Invalid transfer by gift.

An equitable mortgagee by deposit of deeds cannot pass his interest in the mortgaged property by a parol voluntary gift accompanied by a delivery of the deeds, and the donee has, in such case, no right to retain the deeds (*q*).

Costs of transfer.

The costs of a transfer of mortgage are generally payable by the mortgagee (*r*), unless the mortgage is called in, and transferred to a third person for the convenience of the mortgagor (*s*). The scale fee does not apply to the transfer of a mortgage (*t*).

Right to compel transfer.

A mortgagee was not, before the Conveyancing Act, 1881, generally compellable to transfer his security (*u*). The question as to the right of a mortgagor, who is called on to pay off the mortgage, to require a transfer to a third person advancing the money, instead of a reconveyance, will be considered later (*x*).

ii.—**Sub-Mortgage.**—Debts secured by mortgage are often the subject of assignments by way of mortgage which are termed sub-mortgages.

Right of legal or equitable mortgagee to sub-mortgage.

A legal mortgagee may make a legal or an equitable sub-mortgage, and an equitable mortgagee by deposit of deeds may create an equitable sub-mortgage, by depositing the deeds with a third person, although he does not deliver over the memoran-

(*o*) 44 & 45 Vict. c. 41, s. 50. See further as to transfers of mortgages on a change of trustees, *ante*, p. 551.

(*p*) *Vaughan* v. *Vanderstegen*, *Annesley's Case*, 2 Drew. 409; *Sheffield* v. *Eden*, 10 Ch. D. 291. See *Matthews* v. *Wallwyn*, 4 Ves. 119.

(*q*) *Re Richardson*, *Shillito* v. *Hobson*, 30 Ch. D. 396, C. A.; *Re Hancock*, *Hancock* v. *Berrey*, 57 L. J. Ch. 793.

(*r*) *Re Radcliffe*, 22 Beav. 201.

(*s*) See *Sewell* v. *Bishop*, 62 L. J. Ch. 985, C. A.

(*t*) *Re Briscoe and Smith*, (1903) 1 Ir. R. 29.

(*u*) *Colyer* v. *Colyer*, 3 De G. J. & S. 676.

(*x*) See *post*, Chap. LXI., Sect. I. (iv).

dum (*y*). But the sub-mortgage will be good only to the extent of the amount due on the original security, and on payment of that amount the sub-mortgagee must hand over the deeds to the original mortgagor (*z*). An intending sub-mortgagee, therefore, should ascertain, and, if possible, obtain a written admission from the debtor, that the sum alleged to be due is owing.

Notice.

It is not necessary, in order to complete his title, that a sub-mortgagee should give notice to the original mortgagor (*a*); but it is advisable for him to do so because so long as the original mortgagor has no notice of the sub-mortgage, his payments on account of the debt to the original mortgagee, will discharge him (*b*).

Form of sub-mortgage.

Where there is a sub-mortgage, the security will comprise: first, the personal covenant of the sub-mortgagor; secondly, the transfer of the original mortgage debt (*c*) and mortgaged property, subject to redemption, with the benefit of the power of sale, and other powers and remedial clauses contained in the original mortgage; thirdly, a power of sale enabling the sub-mortgagee to dispose of the original mortgage debt and security. If the sub-mortgagee as assignee of the original mortgagee sell under an express power of sale contained in the mortgage, he will be enabled by the terms of the power to give receipts to purchasers, which will be effectual discharges so far as regards the mortgagor and those claiming under him; but a further and special receipt clause will be proper in order to exonerate the purchaser from the necessity of seeing that the sub-mortgagee, after satisfaction of the debt secured by the sub-mortgage, pays the balance to the original mortgagee (*d*). The clause might perhaps be omitted in reliance on the statute, but it is safer to insert it (*e*).

Power of sale.

Vice-Chancellor Kindersley suggested in a judgment what would be the effect on the power of sale of a simple transfer by way of sub-mortgage—whether it would have the effect of transferring the power of sale, or of destroying or suspending

(*y*) *Exp. Smith*, 2 M. D. & De G. 587.

(*z*) *Matthews* v. *Wallwyn*, 4 Ves. 118; *Exp. Tuffnell*, 4 D. & C. 29.

(*a*) *Allen* v. *Lord Southampton*, 16 Ch. D. 178.

(*b*) *Ante*, p. 845. And see *English and Scottish Trust* v. *Brunton*, (1892) 2 Q. B. 700.

(*c*) As to assignments of debts by way of mortgage, see *ante*, pp. 318 *et seq.*

(*d*) Dav. Conv. vol. ii. pt. 2, p. 138.

(*e*) Key & Elph. (9th ed.) vol. ii. p. 222.

it (*f*). When, as in well-drawn deeds, the power of sale is expressly made exerciseable by any person entitled to receive and give a receipt for the mortgage money, the transfer of the mortgage, though by way of sub-mortgage only, would no doubt generally carry with it the power of sale. And the statutory power of sale now incident to the interest of a mortgagee is so made exerciseable (*g*).

Analogy between mortgagee sub-mortgaging and surety.

As a person who takes a sub-mortgage thereby permits the mortgage debt to be appropriated to the discharge from liability to him of the mortgagee and his estate, the latter is in a position bearing a great resemblance to that of a surety, and the sub-mortgagee cannot prevent the original mortgagee from getting in the debt from his mortgagor, who is in the position of the principal debtor, except upon the terms of releasing such mortgagee from his personal liability, and reconveying to him any property of his own which may have been included in the sub-mortgage by way of collateral security. Of course, if the debt is got in by the original mortgagee, he is bound to apply it in discharge of the sub-mortgage (*h*).

Mortgagee must not prejudice sub-mortgagee.

A mortgagee, after a sub-mortgage of a debt and notice given to the debtor, cannot so deal with the debtor as to prejudice the sub-mortgagee (*i*); and in an action for administration of the mortgagor's estate, the sub-mortgagee can prove for the whole original debt, although he cannot receive more than his own principal, interest, and costs (*k*).

Reputed ownership.

In the case of a sub-mortgage, if the original mortgage debt is secured by an estate in land, the doctrine of reputed ownership does not apply (*l*), and on this ground the priority of charge of the sub-mortgagee would not be affected by want of notice.

Avoidance of original mortgage.

The validity of a charge on property by way of sub-mortgage depends on that of the original mortgage. So, where the original mortgage was set aside for fraud and oppression, it was held that the sub-mortgage was also void (*m*).

(*f*) *Cruse* v. *Nowell*, 2 Jur. N. S. 536.
(*g*) 44 & 45 Vict. c. 41, s. 21 (4).
(*h*) *Gurney* v. *Seppings*, 2 Ph. 40.
(*i*) *Re Burrell, Burrell* v. *Smith*, L. R. 7 Eq. 399.
(*k*) *Ibid.* See *post*, Chap. LII. (iii).
(*l*) *Jones* v. *Gibbon*, 9 Ves. 407; *Exp. Mackay*, 1 M. D. & De G. 550.
(*m*) *Cockell* v. *Taylor*, 15 Beav. 103. See *Favell* v. *Wright*, 64 L. T. 85.

Section V.

Devolution and Devise of Legal Estate in Mortgaged Property.

Change in law as to devolution of legal estate.

i.—Devolution, &c. of Legal Estate prior to 1874. — The important changes in the law as to the devolution of mortgage estates which have been successively introduced by the Vendor and Purchaser Act, 1874, and the Conveyancing Act, 1881, in cases of deaths of testators or intestates after the 6th August, 1874, and the 31st December, 1881, respectively, render it convenient to consider separately different classes of cases which may arise according to the date of death.

Devolution under the old law on intestacy.

First, as regards cases in which the date of the mortgagee's death was prior to the 7th August, 1874, the date on which the Vendor and Purchaser Act, 1874 (*n*), came into operation. If the mortgagee dies intestate, the legal estate in the mortgaged property devolved in manner corresponding to that in which the estate would have devolved, if it had been held absolutely and not by way of mortgage; that is to say, if the mortgage was of freeholds upon the heir-at-law, or if it was of copyholds upon the customary heir; and if of land for a term of years, or of personalty, upon the personal representatives of the mortgagee, as part of his personal estate.

Heir a trustee for the personal representative of mortgagee.

As will be seen later, the mortgage debt became, upon the death of the mortgagee, assets in the hands of his administrator (*o*). Where, therefore, the mortgage was of realty, it might happen that the legal estate therein, and the right to the mortgage debt, fell into different hands; and, although the heir becoming thus possessed of the legal estate held it merely as trustee for the administrator (*p*), and was bound to convey such estate to him or by his direction upon payment off or transfer of the mortgage debt, it is obvious that an intestacy as to the legal estate in the mortgaged lands must sometimes have been productive of delay, expense, and inconvenience.

Devise of legal estate.

If, instead of dying intestate as to the legal estate, the mortgagee had made a will in terms, the effect of which was to pass the legal estate only, then the devisee became a trustee for the

(*n*) 37 & 38 Vict. c. 78.
(*o*) See *post*, p. 877.
(*p*) See *Exp. Morgan*, 10 Ves. 101.

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executor; or, if the testator had so devised the mortgaged lands as to pass the beneficial interest to A., and the legal estate to B., then B. became a trustee for A. (*q*), or, lastly, the testator might have given both the beneficial and legal interests to the same person.

In modern times, the principal question has been whether, by the terms of a general devise, the legal interest has passed so as to bring the devisee as a trustee within the meaning of the Trustee Acts (*r*); the question being, whether a general devise, sufficient in terms to comprehend all the testator's real estate, would of itself pass the legal fee in lands of which the testator was seised as a mortgagee or trustee.

Mortgage estates pass by general devise.

A general devise of lands, unless a contrary intention can be gathered from the will, passes the legal estate in property vested in the testator as trustee or mortgagee (*s*); and the circumstance of there being other property to which the devise is applicable, is no ground for excluding trust or mortgage estates.

Intention to be gathered from whole will.

The rule is not that in every case where general words are used the property shall or shall not pass, but that in each case every part of the will must be looked at for the intention with regard to that property (*t*).

Distinction between gifts of trust estates and of mortgage estates.

A distinction may be taken between a mere trust estate and a mortgage, for good sense requires that a beneficial gift should carry the legal estate in a mortgage as an incident, and a useful and necessary incident, to the beneficial ownership. There may be cases where a trust estate would not pass, and yet there would be a plain intention that a legal estate in a mortgage should pass (*u*).

What expressions sufficient to show intention not to pass legal estate.

The intention is to be gathered from the whole will, looking at the nature of the trusts, and of the powers given to the devisee (*x*). But the intention that trust and mortgage estates shall not pass must appear by expressions inconsistent with an intention that they should pass (*y*). Even a devise by a

(*q*) See note to *Casborne* v. *Scarfe*, 1 Atk. 605.

(*r*) See *post*, Chap. LXI., Sect. II.

(*s*) *Lord Braybroke* v. *Inskip*, 8 Ves. 417. See also *Bainbridge* v. *Lord Ashburton*, 2 Y. & C. Ex. 347; *Lindsell* v. *Thacker*, 12 Sim. 182; *Sharpe* v. *Sharpe*, 17 L. J. Ch. 384; *Langford* v. *Auger*, 4 Ha. 313.

(*t*) *Lord Braybroke* v. *Inskip*, 8 Ves. 435.

(*u*) *Re Stevens' Will*, L. R. 6 Eq. 599. See *Re Field's Mortgage*, 9 Ha. 414.

(*x*) *Re Packman and Moss*, 1 Ch. D. 214, 217. See *Re Smith's Estate*, 4 Ch. D. 70.

(*y*) *Bainbridge* v. *Lord Ashburton*, 2 Y. & C. Ex. 347.

trustee to the devisee for his absolute use and benefit, and to be disposed of by deed or will as he may think fit, was held to pass the trust estate (*z*).

A general devise will pass the legal estate though the devisee is an infant (*a*).

Charge of debts, &c., excludes mortgage estates.

The legal estate in mortgaged lands will not, however, pass if the property comprised in the general devise is made subject to the payment of debts, legacies, annuities, or any other species of charge (*b*), or if the will contains any limitations or provisions to which the testator cannot have intended to subject property not beneficially his own, as uses in strict settlement (*c*), or executory limitations (*d*), or a trust for sale (*e*), or for a charity (*f*), or for the separate use of a married woman (*g*), or for an unascertained class (*h*), or words of severance either *simpliciter* (*i*), or with a clause of accruer amongst the devisees (*k*).

Exceptions to rule.

But to this rule there are some important exceptions.

Where mortgagee has both legal and beneficial interest.

If not only the legal estate in mortgaged lands, but also the beneficial interest in the mortgage moneys is vested in the testator, a charge of debts and legacies will not prevent the legal estate in the lands from passing to the devisee. In such a case good sense and convenience require that the legal estate should pass as a useful and necessary incident to the beneficial ownership (*l*).

Where, however, a mortgagee with only a partial beneficial interest in the equity of redemption devised all his real and personal estate on trust to pay his debts, with power of sale, the legal estate was held not to pass (*m*).

(*z*) *Exp. Shaw*, 8 Sim. 159. See also *Lewis* v. *Matthews*, L. R. 2 Eq. 177; *Re Stevens' Will*, L. R. 6 Eq. 599.

(*a*) *Exp. Sergison*, 4 Ves. 147.

(*b*) *Duke of Leeds* v. *Mundy*, 3 Ves. 348; *Silvester* v. *Jarman*, 10 Pri. 78; *Re Horsfall*, M'Cl. & Y. 292; *Doe* d. *Roylance* v. *Lightfoot*, 8 M. & W. 553; *Re Packman and Moss*, 1 Ch. D. 214.

(*c*) *Thompson* v. *Grant*, 4 Madd. 438; *Att.-Gen.* v. *Vigor*, 8 Ves. 276.

(*d*) *Lord Braybroke* v. *Inskip*, 8 Ves. 434. See *Re Smith's Estate*, 3 Ch. D. 70.

(*e*) *Exp. Marshall*, 9 Sim. 555; *Re Cantley*, 17 Jur. N. S. 124.

(*f*) *Att.-Gen.* v. *Vigor*, 8 Ves. 276.

(*g*) *Lindsell* v. *Thacker*, 12 Sim. 178. But see *Lewis* v. *Matthews*, L. R. 2 Eq. 181.

(*h*) *Re Finney's Estate*, 3 Gif. 465.

(*i*) *Martin* v. *Laverton*, L. R. 9 Eq. 568.

(*k*) *Thirtle* v. *Vaughan*, 24 L. T. 5; *Martin* v. *Laverton*, *sup.*; *Re Franklyn*, W. N. (1888) 217.

(*l*) *Re Stevens' Will*, L. R. 6 Eq. 597.

(*m*) *Thompson* v. *Grant*, 4 Madd. 438.

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Where realty and personalty are given together on trust to get in securities.

Again, where real and personal estate are devised and bequeathed together in trust to sell and to get in all debts owing on any security, the trustees cannot execute these trusts as regards the personalty without having the mortgage estate, and it is apparently to be presumed that in such a case the legal estate in the mortgaged realty is also intended to pass by the devise (*n*).

Similar gift where no reference to securities.

But a general gift of real and personal estate *simpliciter*, without any reference to securities, if charged with debts, or with debts and legacies, will not include mortgage estates (*o*).

A direction to pay debts followed by a general devise creates a charge upon the real estates, and where there is a charge of debts, or of debts and legacies, or of legacies only, a trust estate will not pass under a general devise of real estate (*p*).

Devise of "mortgages," "securities for money," &c., pass the legal estate.

It is now settled that the words "mortgages," "securities for money," and other similar expressions would, prior to 1882, pass the entire benefit of the mortgage security, including the legal estate in the mortgaged lands (*q*), unless a contrary intention appears from the context of the will, and that the fact of those words being followed by a limitation to executors and administrators only, and not to heirs, or by other words applicable only to personal estate (*r*), or by a charge of debts and legacies (*s*), or by a trust for sale (*t*), or for several as tenants in common (*u*), will not prevent the legal estate from passing, it being presumed to be the testator's intention that such estate should pass, so as to enable the donee to enforce payment of the mortgage money (*x*).

A direction that the testator's wife should "receive all moneys upon mortgage" was held to pass the whole benefit of the securities, including the legal estate on which the moneys were secured (*y*).

(*n*) *Re Arrowsmith's Trusts*, 27 L. J. Ch. 704.

(*o*) *Doe* d. *Roylance* v. *Lightfoot*, 8 M. & W. 553.

(*p*) *Re Bellis's Trusts*, 5 Ch. D. 504.

(*q*) *Renvoize* v. *Cooper*, 6 Mad. 371; *Silberschildt* v. *Schiott*, 3 Ves. & B. 49; *Re Walker's Estate*, 21 L. J. Ch. 674; *Knight* v. *Robinson*, 2 K. & J. 503; *Rippen* v. *Priest*, 13 C. B. N. S. 308; *Garnham* v. *Skipper*, 55 L. J. Ch. 263. See *Re Stevens' Will*, L. R. 6 Eq. 598; *Ogle* v. *Knipe*, L. R. 8 Eq. 434.

(*r*) *Renvoize* v. *Cooper*, *sup.*; *Re King's Mortgage*, 5 De G. & S. 644.

(*s*) *Re Field*, 9 Ha. 414; *Re King's Mortgage*, *sup.*; *Rippen* v. *Priest*, *sup.*; *Knight* v. *Robinson*, *sup.*

(*t*) *Exp. Barber*, 5 Sim. 451.

(*u*) *Exp. Whiteacre*, Rolls, 22 July, 1807; 1 Sanders, Uses and Trusts, 359, n.

(*x*) See Jarman on Wills (6th ed.), vol. i. p. 975.

(*y*) *Doe* d. *Guest* v. *Bennett*, 6 Exch. 892.

By the 55 Geo. III. c. 192, surrenders of copyholds to the use of the will were rendered unnecessary.

As to copyholds.

A general devise of real estate will, since that statute, pass copyholds, although there are freeholds to satisfy the words of the will, and though parts of the will are inapplicable to copyhold (*z*), if the will was made subsequent to the statute, but not if the will was made prior to the statute, although the death of the testator was subsequent to it (*a*). And an enactment to the like effect is contained in the Wills Act (*b*).

General devise passes copyholds without surrender.

As to mortgages of terms.

With respect to mortgages for terms of years, it is conceived that they fall within the general rule that leaseholds for years did not under the old law prior to the Wills Act pass by a general devise of lands, unless the testator had at the date of his will no freeholds on which the devise was capable of operating (*c*). Under the present law, it is clear that such interest will pass under a general devise, in the absence of any indication of contrary intention in the context of the will (*d*).

Express devise of mortgage estates.

In order to obviate the inconvenience which might arise if, upon the construction of a will, its effect should be to vest the legal estate and the beneficial interest in the testator's mortgages in different persons, it became a general practice to except the testator's mortgaged and trust estates out of a general devise in his will, and to insert an express devise of these estates to trustees, with a declaration as to mortgages that the money secured thereon shall be considered as part of his personal estate, and as to trust estates subject to the trusts.

As to devise by mortgagee of lands contracted to be sold by him.

If a mortgagee has contracted to sell the mortgaged lands, he is a constructive trustee of the legal estate for the purchaser but still retaining a beneficial interest in the property by way of lien or charge to secure his purchase-money; if, therefore, the mortgagee die before conveyance, having by his will devised his real estate generally to A. and B., and his trust estates to A. only, the legal estate in the land contracted to be sold will pass to the devisee of the trust estates (*e*).

Where there is a general devise on trust for sale.

If in such a case the will contain no devise of trust estates, the legal estate in the lands contracted to be sold will pass by a general gift of real and personal estate on trust for sale and

(*z*) *Doe* v. *Ludlam*, 7 Bing. 275; *Weigall* v. *Brome*, 6 Sim. 99.
(*a*) *Doe* v. *Bird*, 5 B. & Ad. 695.
(*b*) 1 Vict. c. 26, s. 3.
(*c*) *Rose* v. *Bartlett*, Cro. Car. 273.
(*d*) 1 Vict. c. 26, s. 26.
(*e*) *Lysaght* v. *Edwards*, 2 Ch. D. 499.

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conversion for the purpose of enabling the trusts of the will to be carried out (*f*).

Where the mortgagee is a bare trustee for the purchaser.

If the purchase has been completed by payment of the money and delivery of possession, but the mortgagee dies before the execution of the conveyance, he was a bare trustee for the purchaser, and, accordingly, it seems clear that a general devise, coupled with a charge of debts or other disposition applicable only to a beneficial interest, will not pass the legal estate to the devisee (*g*).

Effect of Vendor and Purchaser Act, 1874.

ii.—**Devolution, &c. of Legal Estate under the Vendor and Purchaser Act, 1874.**—Secondly, as to mortgage estates vested in persons who died between the 7th August, 1874, and the 1st January, 1882, when the Conveyancing Act, 1881, came into operation.

By the Vendor and Purchaser Act, 1874 (*h*), it is enacted as follows:—

Legal personal representative may convey legal estate of mortgaged property.

Sect. 4. "The legal personal representative of a mortgagee of a freehold estate, or of a copyhold estate, to which the mortgagee shall have been admitted, may on payment of all sums secured by the mortgage, convey or surrender the mortgaged estate, whether the mortgage be in form an assurance subject to redemption or an assurance upon trust."

Effect of this section.

By this section, the statutory power to convey or surrender is confined to the case of payment off of the mortgage; it does not enable the legal personal representative to convey or surrender upon a transfer of a mortgage (*i*); nor does it apply to the exercise of a power of sale in the mortgage deed (*k*). In such cases, therefore, the old law as to the effect of the mortgagee's will on the legal estate still applies, if the mortgagee died before the 1st January, 1882.

This section was repealed and superseded, as to deaths after 1881, by the Conveyancing Act, 1881, s. 30, which in turn has been superseded, as to copyholds, by the Copyhold Act, 1894, s. 88 (*l*).

(*f*) *Wall* v. *Bright*, 1 J. & W. 494; *Lysaght* v. *Edwards*, 2 Ch. D. 499.

(*g*) *Dimes* v. *Grand Junction Canal Co.*, 9 Q. B. 490; 3 H. L. C. 794.

(*h*) 37 & 38 Vict. c. 78.

(*i*) *Re Brook's Mortgage*, 46 L. J. Ch. 865. See also *Re Spradbery's Mortgage*, 14 Ch. D. 514.

(*k*) *Re White's Mortgage*, 29 W. R. 820.

(*l*) *Post*, p. 867.

The Act above referred to further enacted that:—

Bare legal estate in fee simple to vest in executor or administrator.

Sect. 5. "Upon the death of a bare trustee of any corporeal or incorporeal hereditament of which such trustee was seised in fee simple, such hereditaments shall vest like a chattel real in the legal personal representative from time to time of such trustee."

By the Land Transfer Act, 1875 (*m*), the fifth section of the former statute was repealed, and re-enacted as follows:—

Repeal and re-enactment (with amendments) of 37 & 38 Vict. c. 78, s. 5, not to apply to registered lands.

Sect. 48. "Sect. 5 of the Vendor and Purchaser Act, 1874, shall be repealed on and after the commencement of this Act, except as to anything duly done thereunder before the commencement of this Act; and instead thereof be it enacted that upon the death of a bare trustee, intestate, as to any corporeal or incorporeal hereditament of which such trustee was seised in fee simple, such hereditament shall vest like a chattel real in the legal personal representative from time to time of such trustee; but the enactment by this section substituted for the aforesaid section of the Vendor and Purchaser Act, 1874, shall not apply to lands registered under this Act."

Where a bare trustee died after the passing of the former Act, but before the 1st January, 1876, the commencement of the latter Act, neither Act applied (*n*).

The effect of this enactment (which is restricted in its application to the death of a bare trustee intestate) is that the personal representative of a mortgagee who is a bare trustee, such as a mortgagee who has died after selling and receiving the purchase-money, but before conveyance (*o*), takes the estate, and not merely, as in the ordinary case of a mortgage estate, power to convey it.

If there is no personal representative, the estate devolves on the heir, until administration is taken out (*p*).

It will be observed that both sect. 5 of the Vendor and Purchaser Act, 1874, and sect. 48 of the Land Transfer Act, 1875, apply only to hereditaments of which the bare trustee was seised in fee simple, so as to exclude from their operation lands of copyhold or customary tenure, or held on leases for lives.

(*m*) 38 & 39 Vict. c. 87.

(*n*) *Christie* v. *Ovington*, 1 Ch. D. 279.

(*o*) A trustee who has a beneficial interest in the estate, as a vendor mortgagee having a lien for unpaid purchase-money, is not a "bare trustee." See *Morgan* v. *Swansea Urban Sanitary Authority*, 9 Ch. D. 582. See as to meaning of "bare trustee," *Christie* v. *Ovington*, 1 Ch. D. at p. 281; *Re Cunningham and Frayling*, (1891) 2 Ch. 567.

(*p*) *Christie* v. *Ovington*, 1 Ch. D. 279.

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The latter enactment was repealed by the Conveyancing Act, 1881, s. 30 (*q*).

Effect of Conveyancing Act, 1881.

iii.—Devolution of Legal Estate under Conveyancing Act, 1881.—Thirdly, as regards persons who have died since the 31st December, 1881, the law with regard to the devolution of mortgage estates is altogether changed by sect. 30 of the Conveyancing Act, 1881 (*r*), which enacts as follows:—

Devolution of trust and mortgage estates on death.

"(1.) Where an estate or interest of inheritance, or limited to the heir as special occupant, in any tenements or hereditaments, corporeal or incorporeal, is vested on any trust, or by way of mortgage, in any person solely, the same shall, on his death, notwithstanding any testamentary disposition, devolve to and become vested in his personal representatives or representative from time to time, in like manner as if the same were a chattel real vesting in them or him; and accordingly all the like powers, for one only of several joint personal representatives, as well as for a single personal representative, and for all the personal representatives together, to dispose of and otherwise deal with the same, shall belong to the deceased's personal representatives or representative from time to time, with all the like incidents, but subject to all the like rights, equities and obligations, as if the same were a chattel real vesting in them or him; and, for the purposes of this section, the personal representatives for the time being of the deceased shall be deemed in law his heirs and assigns, within the meaning of all trusts and powers.

"(2.) Sect. 4 of the Vendor and Purchaser Act, 1874, and sect. 48 of the Land Transfer Act, 1875, are hereby repealed.

"(3.) This section, including the repeals therein, applies only in cases of death after the commencement of this Act."

Devise of mortgage estates, now unnecessary.

The effect of this enactment as regards a mortgagee dying since the 31st December, 1881, whether testate or intestate, is to vest the legal estate in mortgaged realty in his personal representative, and so to render unnecessary and inoperative any devise of mortgage estates.

Specific devise of mortgage estate.

Similarly, if the will of a mortgagee contains a specific devise in terms which would formerly have passed the legal estate in the mortgaged lands to the devisee, such legal estate will nevertheless by virtue of the statute vest in the personal representatives of the mortgagee; and the only question which may arise upon the devise is whether it is in terms sufficient

(*q*) 44 & 45 Vict. c. 41. As to repeals in Ireland, see sect. 73.

(*r*) 44 & 45 Vict. c. 41. Compare with this the wider provisions of the Land Transfer Act, 1897.

to pass to the devisee the beneficial interest in the mortgage moneys.

The section does not confer on the legal personal representatives of a sole mortgagee any powers additional to those which the heir would have possessed (*s*).

Meaning of "hereditaments."

The term "hereditaments" in this enactment includes not only fee farm rents, chief rents, and rentcharges issuing out of land, but also personal estates in fee simple such as annuities granted to a man and his heirs (*t*).

As to copyholds.

The term "tenements and hereditaments" was held to include copyholds, so as to vest them in the executors of a deceased sole trustee or mortgagee (*u*). But this construction was negatived by sect. 45 of the Copyhold Act, 1887 (*x*), so far as regards land of copyhold and customary tenure to which the mortgagee had been admitted. This enactment was in its turn repealed by the Copyhold Act, 1894 (*y*), which enacts as follows:—

Descent of trust and mortgage estates in copyholds.

Sect. 88. "Sect. 30 of the Conveyancing and Law of Property Act, 1881, shall not apply to land of copyhold or customary tenure vested in the tenant on the court rolls on trust or by way of mortgage."

This section re-enacts the repealed sect. 45 of the Copyhold Act, 1887 (*x*), which Act received the Royal Assent on the 16th September, 1887, but does not specify any date on which the Act was to commence. The result is that sect. 30 of the Act of 1881 must be read as if it had originally never applied to lands of copyhold or customary tenure to which the mortgagee had been admitted (*z*).

Devolution of right of admittance.

It seems clear that where (as is usually the case) the mortgagee has not been admitted, and consequently the land is not at his death vested in him as tenant on the court rolls, the right to admittance is an "interest of inheritance" (*a*), and accordingly now vested in his personal representatives under sect. 30 of the Act of 1881, notwithstanding the Copyhold Acts, 1887 and 1894.

(*s*) *Re Crunden and Meux*, (1909) 1 Ch. 690.

(*t*) As to such annuities, see Co. Lit. 2 a, 20 a; *Earl of Stafford* v. *Buckley*, 2 Ves. Sen. 170; *Countess of Holdernesse* v. *Marquis of Carmarthen*, 1 Bro. C. C. 377.

(*u*) *Hall* v. *Bromley*, 35 Ch. D. 642, 651, C. A.

(*x*) 50 & 51 Vict. c. 73.

(*y*) 57 & 58 Vict. c. 46.

(*z*) *Re Mill's Trusts*, 37 Ch. D. 312; 40 Ch. D. 14.

(*a*) Vin. Abr. tit. "Copyholds," Q. b.; *Kite and Queinton's Case*, 4 Rep. 25 a.

Vesting order.

Where the mortgagee had been admitted and the legal estate in copyholds was outstanding in the infant heir, Stirling, J., made an order vesting the legal estate in the executors of the deceased mortgagee (*b*).

Power of executors to convey before probate.

Where a sole mortgagee has by his will appointed executors, they may now, before probate, convey the legal estate in the mortgaged hereditaments, except copyhold or customary hereditaments to which their testator had been admitted, and if all the executors should die after such conveyance, but before probate, the conveyance will stand good (*c*).

No personal representatives.

If a sole mortgagee has died intestate or without having appointed executors of his will, and administration has not been taken out, a vesting order will be necessary (*d*). It would seem that the effect of the statute is altogether to exclude the heir from trust and mortgage estates (*e*).

No devolution of realty, except where mortgage estate is in fee.

It may be observed that, in order that a mortgage estate in freeholds may devolve upon the personal representatives of a deceased mortgagee, it is still necessary that the fee should have been originally vested in him, either alone or jointly with others, by appropriate words of conveyance to him "and his heirs," or "in fee simple," by the mortgage deed. Otherwise, the heir of a deceased mortgagee could not have conveyed the legal estate before 1882; nor can his personal representatives do so under sect. 30 (*f*).

Extent of repeal of Vendor and Purchaser Act, s. 4.

The repeals effected by sect. 30 of the Conveyancing Act, 1881, apply only in cases of death after the commencement of that Act, and consequently sect. 4 of the Vendor and Purchaser Act, 1874, still remains in force as regards deaths before the 1st January, 1882. Thus, in the case of a sole mortgagee who died between the 7th August, 1874, and the 31st December, 1881, both dates inclusive, the personal representatives have still power, on payment off of the mortgage moneys, to convey the legal estate in the mortgaged lands; but until they exercise the power, and unless the mortgage is paid off, the legal estate remains vested in the heir or devisee (*g*).

(*b*) *Re Franklyn's Mortgages*, W. N. (1888) 217.

(*c*) Wms. Exors. (9th ed.) 250; *Brazier* v. *Hudson*, 8 Sim. 67.

(*d*) *Re Rackstraw's Trusts*, 33 W. R. 559; *Re Williams' Trusts*, 36 Ch. D. 231.

(*e*) See per Pearson, J., in *Re Pilling's Trusts*, 26 Ch. D. 432.

(*f*) See *Re Ingleby and Norwich Union Co.*, 13 L. R. Ir. 326; *Re Crunden and Meux*, (1909) 1 Ch. 690.

(*g*) See *ante*, p. 864.

With regard to the devolution of real estate contracted to be sold, where a mortgagee or other vendor dies before completion, the Conveyancing Act, 1881, s. 4, enacts as follows:—

Conveyancing Act, 1881, s. 4.

Completion of contract after death.

"(1.) Where at the death of any person there is subsisting a contract enforceable against his heir or devisee for the sale of the fee simple or other freehold interest, descendible to his heirs general, in any land, his personal representatives shall, by virtue of this Act, have power to convey the land for all the estate and interest vested in him at his death, in any manner proper for giving effect to the contract.

"(2.) A conveyance made under this section shall not affect the beneficial rights of any person claiming under any testamentary disposition, or as heir or next of kin of a testator or intestate.

"(3.) This section applies only in cases of death after the commencement of this Act."

See now the wider provisions of the Land Transfer Act, 1897, ss. 1, 2.

This section should be read in connection with sect. 30, and is not rendered unnecessary by that section.

Where the legal estate is outstanding the aid of this section is not required, since the person in whom it is outstanding can convey, and the personal representative can give a receipt for the purchase-money.

Section VI.

The Beneficial Interest of a Mortgagee.

Beneficial interest in mortgage is personal estate of mortgagee.

i.—Devolution of Beneficial Interest under Mortgage.—So long as the money and lands in mortgage retain their respective characters impressed upon them in equity, that is, so long as the debt remains the principal, and the land the security, so long the beneficial interest in the mortgage will be regarded as personal estate. And the entry by the mortgagee does not make the mortgage part of his real estate (*h*).

Conversion.

It is, indeed, open to the mortgagee, in the case of a mortgage as well as of any other part of his personal estate, as between his real and personal representatives, to convert his beneficial

(*h*) *Noy* v. *Ellis*, 2 Ch. Ca. 220; *Re Loveridge*, (1902) 2 Ch. 859; *post*, p. 878.

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interest into realty, and make it pass as such accordingly (*i*). So, if mortgage money be agreed to be laid out in land and settled as such, the money will become real estate (*k*). But this depends on other principles of equity, and on the manifest declared intent of the testator (*l*).

Transfer of mortgage does not alter character of beneficial interest.

The mortgage moneys are equally personal estate in the hands of a transferee of the mortgage as in the hands of the original mortgagee; but where an estate had been purchased on which an equity of redemption turned out to be subsisting, the heir of the purchaser, and not the executor, was held to be entitled to the mortgage debt (*m*).

Security taken in name of trustee.

If a mortgage security is taken in the name of a third person, the trust thereby created, being a trust of personalty, is not within the Statute of Frauds, or the doctrine of resulting trusts under that statute; and parol declaration is admissible as evidence of the intention of the party advancing the money as to the parties he intended to benefit by the trust, so as to exclude the claim of his personal representatives (*n*).

Advance by several persons.

If two or more persons advance money jointly on mortgage, and one of them die, the mortgage debt will at law belong to the survivor, but in equity there will be a tenancy in common, the rights of several mortgagees who have contributed to the advance of a sum of money being deemed to be severally proportional to the respective amounts advanced by each (*o*), and consequently, upon a transfer or reconveyance of such a mortgage, the concurrence of the personal representatives of a deceased mortgagee is necessary to give a valid discharge for the mortgage moneys (*p*).

Payment to one of two mortgagees, though a good discharge of the debt at law (*q*), only discharges the security to the extent of the payee's beneficial interest, even though the payee ultimately becomes the survivor of the joint account (*r*).

(*i*) *Noys* v. *Mordaunt*, 2 Vern. 581.

(*k*) *Lawrence* v. *Beverley*, cited 3 P. Wms. 217.

(*l*) See as to conversion of money into realty, Jarman on Wills, vol. i., Chap. XXII.; Theobald on Wills, Chap. XXI.

(*m*) *Cotton* v. *Iles*, 1 Vern. 271.

(*n*) *Benbow* v. *Townsend*, 1 My. & K. 506.

(*o*) *Petty* v. *Styward*, 1 Rep. in Ch. 31; *Vickers* v. *Cowell*, 1 Beav. 529; *Steeds* v. *Steeds*, 22 Q. B. D. 537, 541; *Powell* v. *Brodhurst*, (1901) 2 Ch. 160.

(*p*) *Hind* v. *Poole*, 1 K. & J. 383.

(*q*) *Husband* v. *Davis*, 10 C. B. 645.

(*r*) *Wiglesworth* v. *Wiglesworth*, 16 Beav. 269, 272; *Matson* v. *Dennis*, 4 De G. J. & S. 345; *Powell* v. *Brodhurst*, (1901) 2 Ch. 160.

So the payment to a firm of a separate debt due to a partner will not support a plea of payment to that partner, unless he has authorized the firm to receive it (*s*).

Similarly, a foreclosure or release of the equity of redemption will enure in equity for the benefit of several joint mortgagees, and the personal representatives of such of them as may be deceased, as tenants in common (*t*).

Joint account clause.

Where, therefore, money is lent upon mortgage by trustees, and it is not desirable to put notice of the trust on the mortgage deed, it is the practice to insert a declaration that if one of the mortgagees shall die before the money is paid off, the receipt of the survivor shall be a sufficient discharge, and that the concurrence of the personal representative of the deceased mortgagee shall not be requisite. By sect. 61 of the Conveyancing Act (*u*), a similar effect is given to an expression that the advance is made on a joint account (*x*). The joint account, however, may, as between the mortgagees, be rebutted by evidence (*y*).

Husband and wife.

Moneys belonging to a married woman and invested on mortgage security, like any other property belonging to her, if she was married or if her title to the moneys accrued after the commencement of the Married Women's Property Act, 1882 (*z*), *i.e.*, the 1st of January, 1883, are not subject to her husband's control or interference, and she can accordingly exercise all the rights and remedies of a mortgagee under her security, and give an effectual receipt for the mortgage moneys as if she were a *feme sole* (*a*).

But as regards cases of mortgages to married women not falling within this Act different rules prevail.

If a mortgage, whether for a term of years or in fee, belong to a married woman, the husband may reduce the beneficial interest in it into possession during their joint lives; and if it be for a term of years, he may alone surrender the term; but if it be in fee, a conveyance from him and his wife will be necessary; and after payment of the mortgage debt to the husband the wife would seem to become a trustee within 1 Will. IV. c. 60 (*b*).

(*s*) *Powell* v. *Brodhurst, sup.*
(*t*) *Rigden* v. *Vallier,* 2 Ves. Sen. 258; *Morley* v. *Bird,* 3 Ves. 631.
(*u*) 44 & 45 Vict. c. 41.
(*x*) See further as to this statutory enactment, *ante,* p. 550.
(*y*) *Re Jackson,* 34 Ch. D. 732.
(*z*) 45 & 46 Vict. c. 75, ss. 2, 5.
(*a*) 45 & 46 Vict. c. 75, s. 1 (2).
(*b*) See *Rees* v. *Keith,* 11 Sim. 388.

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A payment of a mortgage debt by a third person to the husband was held to be a reduction into possession, on the ground that payment was made on behalf of the mortgagors (*c*). If the mortgage be for a term of years, he may alone assign the term, which will carry with it the debt, either for or without a valuable consideration; and it will be binding on the wife surviving (*d*). If the mortgage be in fee, then it seems clear that the wife's right to the debt by survivorship is not affected by any assignment made by the husband or by his bankruptcy, unless the debt is reduced into possession in the husband's lifetime (*e*), and then she, of course, becomes a trustee of the legal estate.

As well since (*f*) as before the commencement of the Act, if the husband survive he will, by taking out administration to his wife's effects, become absolutely entitled to the money, and the heir-at-law of the wife (if the mortgage be in fee) will be a trustee for him; but if the wife survive, and the debt has not been reduced into possession, it will survive to her.

The mortgage by a husband and wife of a fund belonging to the latter is binding to the extent of the security, but is no reduction into possession so as to affect her interest as survivor, beyond the amount of the mortgage debt (*g*).

The power of a husband over his wife's personalty, and the question how far that power is subject to the wife's equity to a settlement, is discussed in an earlier chapter (*h*).

ii.—**Bequests of Beneficial Interest in Mortgage.**—The beneficial interest in a mortgage may, of course, like any other personal property, be made, by apt words, to pass by testamentary disposition of the mortgagee (*i*).

General or residuary bequest.

A general or residuary bequest of all the testator's personal property will pass moneys due to him on mortgage security (*k*).

Gift of "mortgages," &c.

A gift of "mortgages," "securities for money," and other

(*c*) And see *Jordan* v. *Jones*, 2 Ph. 170.

(*d*) *Packer* v. *Wyndham*, Pre. Ch. 412; *Bates* v. *Dandy*, 2 Atk. 207, more fully reported 3 Russ. 72.

(*e*) *Purdew* v. *Jackson*, 1 Russ. 68; *Honnor* v. *Morton*, 3 Russ. 65; *Elwin* v. *Williams*, 13 Sim. 309; *Harrison* v. *Andrews*, 13 Sim. 595; *Ashby* v. *Ashby*, 1 Coll. 553; *Stiffe* v. *Everett*, 1 My. & Cr. 39.

(*f*) *Re Lambert's Estate, Stanton* v. *Lambert*, 39 Ch. D. 626; *Surman* v. *Wharton*, (1891) 1 Q. B. 491.

(*g*) *Prole* v. *Soady*, L. R. 3 Ch. 220.

(*h*) *Ante*, Chap. XX.

(*i*) See 1 Vict. c. 26, s. 3.

(*k*) *Att.-Gen.* v. *Bowyer*, 3 Ves. 714, 724.

similar expressions, will comprise the entire beneficial interest in the mortgage security (*l*).

So a bequest of a "mortgage" carries arrears of interest (*m*).

Gift of "money."

A bequest of "money" was held to pass money due to the testator on mortgage security (*n*); but this decision might not perhaps be followed at the present time (*o*).

General devise.

A general devise of lands will not pass the beneficial interest in a mortgage unless a contrary intention appear by the context of the will or by the circumstances of the case (*p*). Nor will money charged on land pass under a specific devise of the land (*q*). In a case in which a testator gave all his freehold, copyhold, and leasehold estates by a general description to trustees to found a college, it was held that some old mortgages, one of which was in fee, passed under the will to the trustees (*r*); but in order to support this decision, Lord Eldon ultimately presumed a release of the equity of redemption of the mortgage in fee, prior to the date of the will (*s*).

Gift of lands by particular description.

If the devise be of lands by a particular description, or by reference to a particular locality, and the testator has no lands answering the description other than mortgage lands, the question whether the devise will pass the beneficial interest in the mortgage seems open to question (*t*). Such a devise was held not to pass the beneficial interest, where the testator was the owner of other lands answering the description (*u*). Now that a devise of specified freeholds, to which the testator is entitled only as mortgagee, cannot operate to pass the legal estate, it might be held that the intention must have been to pass the beneficial interest in the security (*x*).

Effect where mortgagee is in possession.

If, however, the mortgagee is in possession, especially if the possession has been of long duration and accompanied by acts of ownership, a strong presumption is raised that a devise of the

(*l*) *Att.-Gen.* v. *Meyrick*, 2 Ves. Sen. 44; *Dicks* v. *Lambert*, 4 Ves. 730. And see the cases as to legal estate collected *ante*, p. 862.

(*m*) *Goddard* v. *Overend*, (1911) 1 Ir. R. 165.

(*n*) *Selmer's Case*, Gilb. Eq. Rep. 200.

(*o*) See *Re Mason's Will*, 34 Beav. 494; *Byron* v. *Brandreth*, L. R. 16 Eq. 745.

(*p*) *Strode* v. *Russell*, 3 P. Wms. 61; *Casborne* v. *Scarfe*, 1 Atk. 605.

(*q*) *Re Clowes*, (1893) 1 Ch. 214, C. A.; but see *Re Carter*, *inf.*

(*r*) *Att.-Gen.* v. *Bowyer*, 5 Ves. 303.

(*s*) *Att.-Gen.* v. *Vigor*, 8 Ves. 277.

(*t*) Jarman on Wills (6th ed.), vol. i. p. 966.

(*u*) *Martin* d. *Weston* v. *Mowlin*, 2 Burr. 977.

(*x*) But see *Re Clowes*, (1893) 1 Ch. 214.

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Settlement of mortgaged lands.

mortgaged lands is intended to pass the beneficial interest in the moneys secured thereby (*y*).

A fortiori, such an intention will be presumed where the devise of the fee is not to one but to several persons consecutively for limited estates (*z*). Possibly, in such cases, even a general devise of lands might be held to pass the beneficial interest.

Cases where beneficial interest did not pass by devise.

Where a man seised of a reversion in fee after a term which was mortgaged to himself, devised all his freehold house (describing the premises), the mortgage debt was held not to pass, though the term was merged at law; only the reversion in fee passed (*a*).

A devise by a testator to his "dear wife" of specific land which he had contracted to sell, was held to pass the legal estate only, and not the beneficial interest in the purchase-money (*b*).

Apportionment between capital and income where mortgage given on trust for conversion.

Where residuary personal estate comprising an outstanding mortgage investment is bequeathed to trustees upon trust for sale and conversion, and to hold the proceeds upon trust for a person for life, with remainders over, the rule, where the conversion is postponed and the interest has fallen into arrear, is that the mortgage moneys when received must be apportioned between the tenant for life and remainderman, by ascertaining the sum which, if put out at compound interest at 4 per cent. per annum at the death of the testator, with yearly rests, would, with the accumulations of interest, have produced on the day of receipt the amount actually received; and the sum so ascertained will be treated as capital, and the balance as income (*c*).

But where the sum is invested on mortgage by trustees under a power in the will and the rents are not sufficient to keep down the interest, the proceeds of sale must be apportioned in the proportion which the interest in arrear bears to the principal due under the mortgage (*d*).

(*y*) *Clarke* v. *Abbott*, 2 Eq. Ca. Ab. 606; *Re Carter, Dodds* v. *Pearson*, (1900) 1 Ch. 801.

(*z*) *Woodhouse* v. *Meredith*, 1 Mer. 450; *Re Lowman*, (1895) 2 Ch. 348.

(*a*) *Bowen* v. *Barlow*, L. R. 8 Ch. 171.

(*b*) *Knollys* v. *Shepherd*, 1 J. & W. 499.

(*c*) *Re Earl of Chesterfield's Trusts*, 24 Ch. D. 643; *Re Godden*, (1893) 1 Ch. 432; *Re Hobson, Walker* v. *Appach*, 55 L. J. Ch. 422. Kekewich, J., in a recent case held that interest ought to be calculated at 3 per cent.: *Re Goodenough, Marland* v. *Williams*, (1895) 2 Ch. 537.

(*d*) *Re Atkinson*, (1904) 2 Ch. 160; *ante*, p. 545.

What will pass by gift of "mortgages," "securities," &c.

It may be useful incidentally in this place to state what has been held to pass by a gift of "mortgages," "securities for money," and other similar expressions.

The words "securities for money" will include debentures and debenture stock (*e*); bonds (*f*); judgments (*g*); stock in the funds (*h*); moneys payable under a policy of life assurance (*i*); and money on deposit in a post-office savings bank (*k*); also unpaid purchase-money in respect of which the testator has a vendor's lien (*l*); a bill of exchange or promissory note (*m*); but not bank stock (*n*); nor shares in an insurance company (*o*), or canal company (*p*); nor an I O U for goods sold (*q*); nor a banker's deposit note at current interest (*r*); nor a legacy due from another testator's estate (*s*). A policy of assurance on the life of a debtor to the testator is a "security," and has been held to pass by a bequest of "debentures" (*t*).

Where a residuary legatee is entitled to mortgages standing in the name of the testator, or of trustees for his estate, and there are other mortgages charged with legacies, a bequest of all my "money and securities for money," in a will of the residuary legatee, passes the former, but not the latter (*u*).

In the case of a devise by a testator of "all that his property vested in a Swedish mortgage security," the testator having several Swedish mortgages, it was held that all the testator's property invested in Swedish mortgages passed, and that the bequest was not void for uncertainty (*x*).

Scotch heritable bonds, being a collateral security for an English bond, passed under an English bequest of "securities for money" (*y*).

(*e*) *Re Johnson, Greenwood* v. *Robinson*, 89 L. T. 520, C. A.
(*f*) *Bacchus* v. *Gilbee*, 3 De G. J. & S. 577.
(*g*) *West Ham Union* v. *Ovens*, L. R. 8 Ex. 37.
(*h*) *Dicks* v. *Lambert*, 4 Ves. 725; *Bescoby* v. *Pack*, 1 S. & St. 500.
(*i*) *Lawrance* v. *Galsworthy*, 3 Jur. N. S. 1049.
(*k*) *Re Saxby, Saxby* v. *Kiddell*, W. N. (1890) p. 171.
(*l*) *Callow* v. *Callow*, 42 Ch. D. 550.
(*m*) *Barry* v. *Harding*, 1 J. & L. 475, 483. But see *Stiles* v. *Guy*, 4 Y. & C. Ex. 571.
(*n*) *Ogle* v. *Knipe*, L. R. 8 Eq. 434.
(*o*) 21 L. J. Ch. 843.
(*p*) *Hudleston* v. *Gouldsbury*, 10 Beav. 547; *Ogle* v. *Knipe*, L. R. 8 Eq. 434.
(*q*) *Barry* v. *Harding*, 1 J. & L. 475.
(*r*) *Hopkins* v. *Abbott*, L. R. 19 Eq. 222.
(*s*) *Re Mason's Will*, 34 Beav. 494.
(*t*) *Phillips* v. *Eastwood*, Ll. & G. t. Sug. 270.
(*u*) *Ogle* v. *Knipe*, *sup.*
(*x*) *Richards* v. *Patteson*, 15 Sim. 501.
(*y*) *Cust* v. *Goring*, 18 Beav. 383.

Family charges on an estate of which the testator was tenant for life are not included in "money due to him on mortgage from any person." Nor is a perpetual rent-charge (*z*).

A bequest of all the testator's "shares" in a company will not pass debentures, or debenture stock (*a*).

A bequest of the principal of a mortgage debt will not pass the arrears of interest (*b*), and a bequest of the arrears of a mortgage will carry the interest only (*c*).

A bequest of "all my interest and claim on household property at P., on which I have a mortgage," passed arrears of interest as well as the principal (*d*).

A bequest of the amount of a bond of H. carried arrears of interest (*e*), but not a bequest of 300*l*., which A. owes me on bond (*f*).

Ademption of mortgage debt specifically bequeathed.

If the mortgage debt is given by way of a specific legacy, the legacy is adeemed by the mortgage being called in, though the money was immediately re-invested on another mortgage (*g*). But since the Wills Act the case may be otherwise, if the second investment of the legacy should happen to answer the description in the will (*h*).

On the other hand, where a testator after specifically devising land sold it, and it was reconveyed to him by way of mortgage, it was held that the mortgage debt did not pass to the devisee (*i*).

Bequest to pay off sub-mortgage.

If a mortgagee devise the mortgaged estate, and bequeath a sum of money to his executors towards paying off a sub-mortgage created by him, that sum will belong to the devisee, though the mortgaged estate be foreclosed by the sub-mortgagee after the mortgagee's decease (*k*); and this will apply equally to such a devise and bequest by the mortgagor.

(*z*) *Earl Powlett* v. *Hood*, 35 Beav. 234.

(*a*) *Dillon* v. *Arkins*, 17 L. R. Ir. 636, C. A.; *Re Bodman, Bodman* v. *Bodman*, (1891) 3 Ch. 135.

(*b*) *Roberts* v. *Kyffyn*, 2 Atk. 112.

(*c*) *Hamilton* v. *Lloyd*, 2 Ves. Jun. 416.

(*d*) *Gibbon* v. *Gibbon*, 13 C. B. 205.

(*e*) *Harcourt* v. *Morgan*, 2 Keen, 274; *Kent* v. *Tapley*, 11 Jur. 940.

(*f*) *Hawley* v. *Cutts*, 2 Freem. Ch. 24.

(*g*) *Gardner* v. *Hatton*, 6 Sim. 93; *Oliver* v. *Oliver*, L. R. 11 Eq. 506; *Harrison* v. *Jackson*, 7 Ch. D. 339. But see *Le Grice* v. *Finch*, 3 Mer. 50; *Clark* v. *Browne*, 2 Sm. & G. 524; *Moore* v. *Moore*, 29 Beav. 496; *Morgan* v. *Thomas*, 6 Ch. D. 176; *Macdonald* v. *Irvine*, 8 Ch. D. 101, C. A.; *Re Lane*, 14 Ch. D. 856.

(*h*) Wms. Exors. (9th ed.) vol. i. p. 175, note.

(*i*) *Re Clowes*, (1893) 1 Ch. 214.

(*k*) *Lockhart* v. *Hardy*, 9 Beav. 379. And see *Turner* v. *Hudson*, 10 Beav. 222.

iii.—**Liability of Mortgagee's Interest to Claims of Creditors.**—The estate and interest of a mortgagee in the mortgaged property, is liable in his hands for payment of his debts whether by specialty or simple contract, which may be enforced by entering up judgment against him.

Liability to debts.

The judgment creditor of a mortgagee may take his interest in execution and obtain a charge thereon (*l*).

Execution.

Under the stat. 1 & 2 Vict. c. 110, s. 13, a judgment debt against a *cestui que trust* is a charge on his interest in the mortgage investments of the trust funds; and similarly a judgment debt against a legatee is a charge upon property mortgaged to the testator, to the extent of the legatee's interest therein (*m*).

Interest of *cestui que trust* or legatee in mortgage debt.

Where a debtor was entitled to an equitable charge upon land to secure 5,000*l*. and interest, it was held that a judgment creditor of the equitable mortgagee had a charge upon such land (*n*).

Extent of charge under judgment against mortgagee.

But in all such cases a creditor will not now be entitled to a charge on the land unless a writ or order for the purpose of enforcing it is duly registered (*o*).

Where the mortgagor has sold the mortgaged lands and has paid off the mortgagee, the lands in the hands of a purchaser will not be affected by a judgment previously registered against the mortgagee (*p*).

On bankruptcy of a mortgagee, all the estate and interest, both legal and beneficial, of the bankrupt, and the capacity of exercising all powers of sale or other powers in respect of the property which might have been exercised by the bankrupt for his own benefit, will vest in the trustee in the bankruptcy for the benefit of the creditors (*q*).

On the death of a mortgagee, the mortgage debt and the benefit of all securities for the same, vest in his executors or administrators, to be dealt with by them in due course of administration.

iv.—Devolution, &c. after Union of Interest of Mortgagee with Equity of Redemption.—If the mortgagee in his lifetime obtain a release of the equity of redemption, or obtain an abso-

(*l*) *Clare* v. *Wood*, 4 Ha. 81.
(*m*) *Avison* v. *Holmes*, 1 J. & H. 530.
(*n*) *Russell* v. *M'Culloch*, 1 K. & J. 313.
(*o*) 63 & 64 Vict. c. 26, s. 2.
(*p*) 18 & 19 Vict. c. 15, s. 11. See *Greaves* v. *Wilson*, 25 Beav. 434.
(*q*) 46 & 47 Vict. c. 52, ss. 20 (1), 44.

Chap. XLII. § 6 (iv.)

lute decree of foreclosure, and enter into possession, it is manifest that the debt and land have altered their characters, for the land has ceased to be a mere security, and the debt has become merged in the land (*r*); and consequently, if from any circumstances after the death of the mortgagee, the foreclosure be opened or the release set aside, or the time be enlarged for redemption, it is submitted that the heir, and not the next of kin, will be entitled to the money, inasmuch as the mortgagee has done all in his power to make it real estate: this will not be the case if the foreclosure were opened for fraud or irregularity. This doctrine was applied in favour of a devisee in a case in which a decree *nisi* only had been obtained on a bill for foreclosure, the mortgagee dying before a final decree; although, with regard to creditors, the mortgage was still held to be personal assets for the payment of debts (*s*). In a case, however, in which the mortgagor had been long out of possession, but the equity was not barred by time at the death of the mortgagee, the Court would not allow the claim of his wife to dower, though at the time the claim was made the right of redemption had in all probability become extinguished (*t*).

As the land is, in equity, a security for the payment of the money, it follows that if the security is forfeited, the personal representative must be also entitled to the land composing the security; and therefore (independently of the recent statutory enactments hereinbefore considered (*u*)), if the mortgagee die, and his heir afterwards obtain a release of the equity from the mortgagor, or the land becomes irredeemable from length of time, it will nevertheless devolve upon the mortgagee's legal personal representatives as personalty, and the heir will be a trustee for them (*x*), nor can the heir by paying off the mortgage debt to the personal estate retain the land (*y*). On the same principle, if a *feme covert* be possessed of a mortgage in fee, and die, and the lands descend on her heir, her husband will be entitled as her administrator (*z*); and in like manner a mortgage in fee made to a citizen of London was held to be

(*r*) *Thompson* v. *Grant*, 4 Madd. 438.

(*s*) *Garrett* v. *Evers*, Mos. 364.

(*t*) *Flack* v. *Longmate*, 8 Beav. 420, explained *Re Loveridge*, *inf.*

(*u*) *Ante*, pp. 864 *et seq.*

(*x*) *Ellis* v. *Guavas*, 2 Ch. Ca. 50; *Canning* v. *Hicks*, 1 Vern. 412; *Tabor* v. *Grover*, 2 Vern. 367; *Wood* v. *Nosworthy*, cited 2 Vern. 193; *Clerkson* v. *Bowyer*, 2 Vern. 66; *Re Loveridge*, *Drayton* v. *Loveridge*, (1902) 2 Ch. 859.

(*y*) *Re Loveridge*, *sup.*, overruling *Re Woodhead*, W. N. (1884) 174.

(*z*) *Turner* v. *Crane*, 1 Vern. 170.

part of his personal estate, and divisible according to the custom (*a*); and in all these cases the heir-at-law will be a trustee for the persons beneficially entitled, and be decreed to convey.

If, however the mortgagee's estate devolve upon his next of kin, and the estate become irredeemable, the rights of the next of kin become enlarged so that what was before personalty becomes realty, and will pass on his death intestate to his heir (*b*).

By sect. 24 of the Wills Act (*c*), it is enacted that—

A will shall be construed to speak from the death of the testator.

"Every will shall be construed, with reference to the real estate and personal estate comprised in it, to speak and take effect as if it had been executed immediately before the death of the testator, unless a contrary intention shall appear by the will."

Effect of release, &c. during testator's life.

A release or foreclosure of the equity of redemption obtained at any time during the testator's life will, accordingly, as a general rule, in cases within the Act, enure for the benefit of the devisee.

In the case of a will made before the 1st January, 1838, and not subsequently re-executed, re-published, or revived by codicil, the question as to the effect of a release or foreclosure subsequent to the date of the will is governed by the old law prior to the Act. If a mortgagee obtained an absolute decree of foreclosure, or a release of the equity of redemption, or even became absolutely entitled by length of possession, prior to the date of his will, a general devise would, it is conceived, unless he manifested an express intention to the contrary, pass the mortgaged lands; but if at the time of the will he was not so absolutely entitled, then it is conceived that a subsequent foreclosure or release would not have conferred on the devisee the beneficial estate, because a foreclosure is considered as a new purchase of the land. The consequence was, that if the legal interest in mortgaged lands had, by a general description, passed at law to the devisee, and the mortgagee afterwards obtained a release or foreclosure of the equity of redemption, or became absolutely entitled by lapse of time, and died without a republication of his will, the devisee became a trustee for the testator's heir-at-law, even although the devisee was

(*a*) 1 Ch. Ca. 285.
(*b*) *Re Loveridge, Pearce* v. *Marsh*, (1904) 1 Ch. 518.
(*c*) 1 Vict. c. 26.

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also the executor or residuary legatee, notwithstanding doubts to the contrary. In *Attorney-General* v. *Bowyer* (*d*), Lord Eldon surmounted the difficulty by presuming a release of the equity of redemption prior to the date of the will.

A bequest of money secured on mortgage has been held to pass the estate, though foreclosed at the date of the will, and not to open the foreclosure, it appearing on the whole will that the legatee was intended to take the interest in the land (*e*).

But a mere general devise of all estates of which the testator is seised as mortgagee will not pass the absolute estate in the land where the testator subsequently purchases the equity of redemption. This is a case of ademption (*f*).

(*d*) 3 Ves. 714, 724, 725; 5 Ves. 300, 303; 8 Ves. 277. See *Thompson* v. *Grant*, 4 Madd. 438; *Garrett* v. *Evers*, Mos. 364.

(*e*) *Le Gros* v. *Cockerell*, 5 Sim. 384; *Silberschilt* v. *Schiott*, 3 V. & B. 49.

(*f*) *Yardley* v. *Holland*, L. R. 20 Eq. 428. Cf. *Re Clowes*, (1893) 1 Ch. 214, C. A.

CHAPTER XLIII.

CONSOLIDATION OF SECURITIES.

i.—Nature and Operation of the Doctrine of Consolidation generally.—The doctrine of the consolidation of securities is often treated as if it were a branch of the doctrine of tacking, but it in fact rests on different principles.

Difference between consolidation and tacking.

Tacking is the union of several debts upon one estate (*a*); consolidation is the union of several debts, respectively charged on several estates. Consolidation does not depend, like tacking, upon the possession of the legal estate. In tacking notice is material, in consolidation it is not. The object of tacking is to oust a mesne incumbrancer, but the effect of consolidation may be to enable a puisne mortgagee to throw his debt on to another estate.

Apart from the Conveyancing Act, 1881, s. 17 (*b*), the authorities lead to this conclusion, that if two or more distinct mortgages be made of different estates between the same parties, or if a sum of money be advanced on one estate, and other estates be afterwards made a security for the sum already advanced, and also for further advances, although without any agreement that the first estate shall be charged with the further advances, nevertheless, neither the mortgagor nor any one claiming under him the equity of redemption of one of the estates, although without notice of the other mortgage or charge, shall be permitted to redeem one mortgage without redeeming both. From this doctrine it is manifest that great care and caution are requisite in a purchase or mortgage of an equity of redemption, and that the first mortgagee should not merely be questioned as to the amount of the actual mortgage on the estate intended to be purchased or mortgaged, but, generally, what is the extent of his charge or lien upon it.

Statement of the doctrine of consolidation.

(*a*) See as to "tacking," *post*, Chap. LV. (*b*) *Post*, p. 892.

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No consolidation before default.

"The whole doctrine of consolidation, whatever may have been the particular circumstances under which it has been applied to different cases, arises from the power of the Court of equity to put its own price upon its own interference as a matter of equitable consideration in favour of any suitor" (*c*). The right of a mortgagee to consolidate is, therefore, consistent only with the equitable rights of the mortgagee to foreclose, and of the mortgagor to redeem. In other words, the right is only enforceable where default in payment on the days appointed by the terms of the contracts has been made on all the securities in respect of which it is claimed (*d*).

Consolidation in foreclosure and redemption actions.

A mortgagee who is entitled to consolidate his securities may set up his right equally in an action for foreclosure, as in an action for redemption (*e*).

Parties.

Where the principle of the consolidation of several mortgages on distinct estates is sought to be applied, the persons interested in the equity of redemption of the second mortgaged estate are necessary parties (*f*); but not where the object of the suit is not to throw a larger burden on the second estate (*g*).

Sale under power.

The right to consolidate may be exercised, though the mortgagee is selling one of the mortgaged properties under his power of sale (*h*).

Where a second mortgagee selling under his power is compelled by the first mortgagee out of the proceeds of sale to pay off not only his prior mortgage, but also a mortgage upon another property which the first mortgagee has consolidated, the second mortgagee is equitable assignee of the latter, and can consolidate it with his own (*i*).

Consolidation of equitable mortgages.

The right of consolidation exists whether the securities are legal or equitable.

It is not necessary that the mortgagee should have the legal estate to entitle him to the benefit of the principle, and where two equitable mortgages upon different estates to different persons become united in one, neither the mortgagor nor a sub-

(*c*) Per James, L.J., in *Cummins* v. *Fletcher*, 14 Ch. D. 699, 708, C. A.

(*d*) Per Cotton, L.J., in *Cummins* v. *Fletcher*, 14 Ch. D. at p. 711, C. A.

(*e*) *Selby* v. *Pomfret*, 3 De G. F. & J. 595; *Watts* v. *Symes*, 1 De G. M. & G. 240; *Cummins* v. *Fletcher*, 14 Ch. D. 699, C. A.

(*f*) *Ireson* v. *Denn*, 2 Cox, 425.

(*g*) *Mills* v. *Jennings*, 13 Ch. D. 639, 649, C. A.; affirmed, *Jennings* v. *Jordan*, 6 App. Ca. 698.

(*h*) *Selby* v. *Pomfret*, 3 De G. F. & J. 595; *Cracknall* v. *Janson*, 11 Ch. D. 1, C. A.

(*i*) *Cracknall* v. *Janson*, *sup.*

sequent mortgagee with notice of the equitable mortgage can redeem one without the other (*k*).

Consolidation of securities does not depend like tacking upon the possession of the legal estate (*l*). As between successive mortgagees, however, the possession of the legal estate, or priority of registration or other circumstances may be material in determining whether the first mortgagee has priority so as to be entitled to be redeemed by and consequently to consolidate against a subsequent mortgagee.

Registration may give prior right to consolidate.

If land in a register county is mortgaged to A., and then mortgaged to B. who acquires priority by registration, B. can consolidate his mortgage on that property with a mortgage held by him on other property of the same mortgagor as against A.'s mortgage, although the latter is prior in point of date, assuming, of course, that in other respects, the right to consolidate exists (*m*).

Judgment creditors.

Judgment creditors may consolidate (*n*).

Consolidation of securities of different natures.

Securities of different natures can be consolidated, as an assignment of policies and a mortgage of freeholds and leaseholds (*o*).

Where, however, a mortgagee of land had also a registered bill of sale of goods, he was not permitted to consolidate his securities, to the prejudice of an execution creditor against the goods (*p*).

Mortgagee not compellable to consolidate.

The mortgagor cannot compel the mortgagee to consolidate (*pp*). So a second mortgagee of two estates, on each of which there is a prior distinct mortgage, may redeem either of the prior separate mortgages, and then foreclose the mortgagor as to that particular estate; and even in a suit, instituted by him to redeem both the prior mortgages, he may have a decree to redeem both or either of them, and to foreclose the mortgagor accordingly (*q*).

Consolidation as between one mortgagee

ii.—Against what Persons Mortgages may be consolidated.—The doctrine of consolidation applies in its simplest

(*k*) *Tweedale* v. *Tweedale*, 23 Beav. 341; *Watts* v. *Symes*, *sup.*; *Neve* v. *Pennell*, 2 H. & M. 170, 183; *Exp. Berridge*, *Re Loosemore*, 3 M. D. & De G. 464; *Cracknall* v. *Janson*, 11 Ch. D. 9, C. A.

(*l*) *Neve* v. *Pennell*, *sup.*

(*m*) *Neve* v. *Pennell*, 2 H. & M. 170.

(*n*) *Spalding* v. *Thompson*, 26 Beav. 637.

(*o*) *Ibid.*; *Cracknall* v. *Janson*, 11 Ch. D. 1, C. A. And see *Re Salmon*, (1903) 1 K. B. 147.

(*p*) *Chesworth* v. *Hunt*, 5 C. P. D. 266.

(*pp*) *Re Thomson's Estate*, (1912) 1 Ir. R. 194.

(*q*) *Pelly* v. *Wathen*, 1 De G. M. & G. 16.

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form in cases in which the only parties concerned are the mortgagor of the one part, and the mortgagee of the other part.

and one mortgagor.

This is the case if the mortgages are originally, or subsequently become, vested in the same mortgagee, whilst the equities of redemption remain united in the same person, as the right of the several estates having once accrued to the mortgagee ought not to be defeated by the subsequent act of the mortgagor.

Several securities for distinct debts.

Where several distinct estates have been separately mortgaged as securities for distinct debts by one mortgagor to one mortgagee, the latter has a right to hold all the estates as security for the aggregate of all the debts.

Title or value of one estate defective.

Thus, where the title to one of two mortgaged estates proves defective, the mortgagor cannot redeem without payment of both (*r*). Similarly where one estate is deficient in value, or worthless as a contingent interest, the one cannot be redeemed without the other (*s*).

This rule is founded on the equitable principle that a Court of Equity would not assist a mortgagor in getting back one of his estates, unless he paid all that was due, though secured on a different estate (*t*).

Consolidation as between transferee of several mortgages and original mortgagor.

The principle applies, although the first mortgages of the several estates were originally made to different mortgagees, if by transfer the several mortgages have come into the hands of one mortgagee (*u*). So it is settled that if an owner of two properties mortgages one to A. and the other to B., and then A.'s mortgage is transferred to B., or both are transferred to C., the owner cannot after that redeem B. in the one case or C. in the other, of one of his securities, without redeeming the other security (*x*). And for this purpose, it is immaterial whether the transferee had a right to call for a transfer, as where he was surety for the debt (*y*), or whether he had no such right (*z*).

The rule as to consolidation equally applies where the vesting in one hand of the first mortgages arises from a second mort-

(*r*) *Shuttleworth* v. *Laycock*, 1 Vern. 245; *Purefoy* v. *Purefoy*, 1 Vern. 29; *Barrow* v. *Manning*, W. N. (1880) 108.

(*s*) *Margrave* v. *Le Hooke*, 2 Vern. 207; *Pope* v. *Onslow*, 2 Vern. 286.

(*t*) *Mills* v. *Jennings*, 13 Ch. D. 639, at p. 646, C. A.; affirmed *Jennings* v. *Jordan*, 6 App. Ca. 698.

(*u*) *Titley* v. *Davies*, 2 Y. & C. C. C. 393, 399, n.; *Tweedale* v. *Tweedale*, 23 Beav. 341.

(*x*) Per Romer, J., in *Pledge* v. *Carr*, (1894) 2 Ch. 328, at p. 330; affirmed, (1895) 1 Ch. 51.

(*y*) *Tweedale* v. *Tweedale*, 23 Beav. 341.

(*z*) *Vint* v. *Padget*, 2 De G. & J. 611.

gagee of one estate having redeemed the first mortgagee of that and other estates (*a*).

Consolidation against several assignees of equities of redemption.

The extension of the doctrine so as to enable a mortgagee to consolidate as against assignees of the equity of redemption, involves considerations of a more complex character. As was remarked by Lord Selborne in *Jennings* v. *Jordan* (*b*), its extension to such a case, "though it may, perhaps, be open to objection on some practical grounds, rests upon an intelligible principle. The purchaser of an equity of redemption must take it as it stood at the time of its purchase, subject to all other equities which then affected it in the hands of his vendor, of which the right of the mortgagee to consolidate his charge on that particular property with other charges then held by him on other property at the same time redeemable under the same mortgagor was one. The mortgagee cannot lose that right, because the mortgagor thinks fit to separate the equities of redemption."

As a general rule, therefore, the right to consolidate exists, though the equities of redemption no longer remain in the same person, and is enforced against a purchaser or mortgagee of the equity of redemption of the estates or either of them (*c*).

Notice to assignee immaterial.

The doctrine was extended to the assignee of the mortgagor, although without notice, in *Cator* v. *Charlton* (*d*) and *Collett* v. *Munden* (*d*), of which Sir R. Arden, M.R., in *Jones* v. *Smith*, said, "Those cases (that is, of *Cator* v. *Charlton* and *Collett* v. *Munden*) amount to this, that if a man makes a mortgage, and afterwards makes another mortgage for another sum, and then assigns the equity of redemption of one, both must be redeemed, and the case of the assignee is not better than that of the original mortgagor."

Union of mortgages on different estates after assignment of equity of redemption of one of them.

Where, however, two mortgages, made by the same mortgagor to different mortgagees, on different estates, become united for the first time in one person after the mortgagor has assigned (by way either of sale or mortgage) the equity of redemption of one of them, the owner of the two mortgages cannot consolidate them as against the assignee of that equity

(*a*) *Titley* v. *Davies*, 2 Y. & C. C. C. 399, n., 403. See *Bovey* v. *Skipwith*, 1 Ch. Ca. 201.

(*b*) 6 App. Ca. 698, 701.

(*c*) *Exp. Carter*, 2 Amb. 733; *Tribourg* v. *Lord Pomfret*, 2 Amb. 734, n.; *Ireson* v. *Denn*, 2 Cox, 425; *Jones* v. *Smith*, 2 Ves. Jun. 372.

(*d*) Cited in *Jones* v. *Smith*, 2 Ves. Jun. 376; and in *Ireson* v. *Denn*, *sup.* See *Neve* v. *Pennell*, 2 H. & M. 170, 183; 33 L. J. Ch. 19.

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of redemption, even though both the mortgages were created before the assignment (*e*).

It was explained by Sir Edward Fry, J., in *Harter* v. *Colman* (*f*), that in such a case the right to consolidate is not an equity affecting the property in the hands of the vendor at the time of the assignment within the meaning of the rule as laid down by Lord Selborne (*g*), inasmuch as the equity arises out of the union in the same person of the two first mortgages and has no existence prior to such union.

Mortgage created subsequently to assignment.

A fortiori, no right to consolidate can be maintained where at the time of the assignment of the equity of redemption of the first estate mortgaged, the mortgage upon the second estate sought to be consolidated was not in existence (*h*).

A first mortgagee is not entitled, as against a second mortgagee of whose mortgage he had notice, to say that the second mortgagee cannot redeem him without paying off mortgages created subsequently to the second mortgage, because he is bound to redeem a mortgage of prior date which by express contract covers the sums secured by the subsequent mortgages (*i*).

Notice.

The result of the establishment of the rules above stated is to render obsolete all questions which were formerly much discussed (*k*), as to the effect of notice of a prior assignment as affecting the mortgagee's claim to consolidate against the assignee.

Consolidation against single assignee of all the equities of redemption.

The rule will apply so as to enable a mortgagee to consolidate his securities as against a single assignee of all the equities of redemption, notwithstanding that the union of the mortgages in the mortgagee may have taken place subsequently to the date of the assignment of the equities of redemption (*l*). In such a case, it has been said, the second incumbrancer must be deemed to have taken his security with knowledge that the

(*e*) *Harter* v. *Colman*, 19 Ch. D. 630. See also *White* v. *Hillacre*, 3 Y. & C. Ex. 597; *Marcon* v. *Bloxam*, 11 Exch. 586; *Jennings* v. *Jordan*, 6 App. Ca. 698; *Minter* v. *Carr*, (1894) 3 Ch. 498, C. A., virtually overruling *Beevor* v. *Luck*, L. R. 4 Eq. 537.

(*f*) 19 Ch. D. 630, at p. 635.

(*g*) *Sup.* p. 885.

(*h*) *Baker* v. *Gray*, 1 Ch. D. 491. See *Jennings* v. *Jordan*, 6 App. Ca. 698; overruling *Tassel* v. *Smith*, 2 De G. & J. 713, so far as the latter case cannot be distinguished upon its particular circumstances. See also *Bird* v. *Wenn*, 33 Ch. D. 215.

(*i*) *Hughes* v. *Britannia Building Society*, (1906) 2 Ch. 607.

(*k*) See Dav. Conv. vol. ii. pt. ii. p. 293.

(*l*) *Tweedale* v. *Tweedale*, 23 Beav. 341; *Vint* v. *Padget*, 2 De G. & J. 611; *Pledge* v. *White*, (1896) A. C. 187.

prior mortgages on the different estates, though then belonging to different mortgagees, might coalesce, and with knowledge of the possible consequence of their coalition (*m*). It must be admitted, however, that this explanation can hardly be considered as satisfactory, having regard to the principle upon which the extension of the doctrine to cases affecting the rights of third parties, was rested by Lord Selborne in *Jennings* v. *Jordan* (*n*). A more satisfactory explanation was given by Sir Edward Fry, J., in *Harter* v. *Colman* (*o*), where he says, "the Court may well say that, where both the first mortgages are vested in one person, and both the equities of redemption are vested in another, the owner of those equities of redemption must do equity, and must give effect to the equities relating to both the estates."

The case of *Vint* v. *Padget*, represented the high-water mark of the doctrine, and it ought not to be extended. It stands on a peculiar footing, and was only upheld by the House of Lords in *Pledge* v. *White* because it had stood so long, and not because they approved of any principle established by it (*p*).

Notice to mortgagee is immaterial.

It is immaterial that the mortgagee claiming under such circumstances to consolidate his securities had, at the time of the union, notice of the prior assignment (*q*).

Order of right to redeem when securities consolidated.

Where mortgages of different properties had been made by the same mortgagor at different dates, and the mortgages had been consolidated by a mortgagee, and the mortgagor had conveyed the equities of redemption to different purchasers, the equity of redemption of the second mortgage being conveyed before the equity of redemption of the first mortgage, it was held in an action for redemption by the owner of the equity of redemption of the second mortgage, that he was entitled to the first right of redemption of both mortgages (*r*).

Consolidation against trustee in bankruptcy.

In case of the bankruptcy of the mortgagor, the trustee in bankruptcy is in no better position than the bankrupt as regards any right to consolidate which accrued prior to the bankruptcy (*s*). Nor can the trustee allow a creditor in his proof

(*m*) *Vint* v. *Padget*, *sup.*
(*n*) 6 App. Ca. 698, 701.
(*o*) 19 Ch. D. 630, 635.
(*p*) *Sharp* v. *Rickards*, (1909) 1 Ch. 109.
(*q*) *Vint* v. *Padget*, 2 De G. & J. 611; *Pledge* v. *White*, (1896) A. C. 187.
(*r*) *Jennings* v. *Jordan*, 6 App. Ca. 698.
(*s*) *Re Salmon*, (1903) 1 K. B. 147. And see *Roe* v. *Soley*, 2 W. Bl. 726; *Marcon* v. *Bloxam*, 25 L. J. Ex. 193.

to lump together several securities and treat them as one aggregate security, and so give him the benefit of consolidation (*t*).

Question of fraudulent preference may arise.

Where, however, the union of the mortgages in the mortgagee takes place subsequently to and with notice to the mortgagee, of the bankruptcy, a question of fraudulent preference may arise.

Where a mortgagee with a deficient security on one estate obtained after and with notice of the mortgagor's bankruptcy, the transfer of a mortgage on another estate with power of sale, he had a right to retain against the assignees in aid of his deficient security the surplus proceeds of a sale made under the power (*u*). But an original mortgage, taken after notice of insolvency, cannot be consolidated with a prior mortgage, for it would amount to a fraudulent preference (*x*).

A question was raised in *Grugeon* v. *Gerrard* (*y*), whether an equitable mortgagee of estate A., whose mortgage was created *before* the bankruptcy of the mortgagor, could as against the assignees consolidate a mortgage upon estate B., by compelling an assignment to himself of the legal estate outstanding in a satisfied mortgagee of estate A. The decision was that he had a right to the assignment, and the question of consolidation was left undecided; but the right to the latter would seem to follow.

Consolidation against heir, &c.

The right equally binds the heir or devisee of the mortgagor; but not the dowress (*z*).

Consolidation as against surety.

The mortgagee's right to consolidate will prevail as against a surety of the mortgagor. So where two properties were mortgaged to a mortgagee for distinct sums, and there was a surety for one of them, it was held that the right of consolidation overrode the right of the surety to have the benefit of the securities for his debt (*a*). This case was reluctantly followed by Byrne, J., and was affirmed, but on other grounds (*b*).

Undisclosed surety.

In another case, where a mortgagor mortgaged two properties by separate deeds to secure distinct debts, and by one of the deeds another person mortgaged certain other property, being,

(*t*) *Re Pearce*, (1909) 2 Ch. 492.
(*u*) *Selby* v. *Pomfret*, 3 De G. F. & J. 595; *Neve* v. *Pennell*, 2 H. & M. 170; *Exp. Alsager*, 2 M. D. & De G. 328.
(*x*) *Exp. Hotchkin*, L. R. 20 Eq. 746.
(*y*) 4 Y. & C. Ex. 119.
(*z*) *Jones* v. *Griffith*, 2 Coll. 207.
(*a*) *Farebrother* v. *Wodehouse*, 23 Beav. 18; but an appeal was compromised, 26 L. J. Ch. 240.
(*b*) *Nicholas* v. *Ridley*, (1904) 1 Ch. 192.

in fact, a surety, but that fact was not disclosed by the deed, it was held that the mortgagee was entitled to consolidate as against the undisclosed surety (*c*).

iii.—**Restrictions on the Right to Consolidate.**—The right of a transferee from the mortgagee to stand in the place of his transferor for the purpose of enforcing the right of the latter to consolidate as against an assignee from the mortgagor of the equity of redemption of one estate, is to some extent limited by the rule that a vendor who has parted with his whole interest in property, cannot indirectly, by any act subsequent to the sale, detract from the interest conveyed to the purchaser. "It is against all principle that a vendor should be enabled, after parting with his whole interest in particular property, to impose an additional burden upon it without the purchaser's consent, ... and without any contract at all" (*d*).

Consolidation by transferee of mortgage against assignee of equity of redemption.

Accordingly, where A. mortgaged Whiteacre, Blackacre, and Greenacre together to B., and afterwards mortgaged Whiteacre to C., then sold Blackacre to D., and finally mortgaged Greenacre to E.; although C., having paid off B., was decreed to hold all three properties until he was paid as well the sum originally advanced by him as that paid by him to redeem B., yet E. was not admitted to redeem Blackacre, the estate sold to D., for at the time of the mortgage of Greenacre to E., A. himself had no right at all in Blackacre, the sale to D. having been made prior to the mortgage to E. If, however, the sale to D. had been only a mortgage, A. would have retained a right of redemption in Blackacre, and could have given that to E. (*e*).

In a case where the owner of two estates, A. and B., having mortgaged both for a long term, sold estate A., and then mortgaged estate B. to different parties, the purchaser of estate A., having afterwards discovered and taken a transfer of the first mortgage in order to protect himself, was held entitled to compel the second mortgagee to pay the whole of the first mortgage, in order to redeem estate B. only, or to be foreclosed of estate B.,

(*c*) *Re Toogood*, W. N. (1889) 73; 61 L. T. 19.

(*d*) Per Lord Selborne, in *Jennings* v. *Jordan*, 6 App. Ca. 698, 702.

(*e*) *Titley* v. *Davies*, 2 Y. & C. C. C. 399, n., 405; approved in *Jennings* v. *Jordan*, *sup.* See per Lord Northington in *Willie* v. *Sugg*, 2 Ed. 78.

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on the ground that such mortgagee was bound by the same equities as his mortgagor (*f*).

No consolidation where different mortgagors.

To apply the doctrine of consolidation the mortgages to be consolidated must have been made by the same person. The right can only arise where all the mortgages were originally made by the same mortgagor, and it is not enough that the different equities of redemption have got into the same hands by assignment (*g*). Nor is it enough that one of the mortgagors is trustee for the other mortgagor, for if on the face of the deeds the equities of redemption are vested in different persons, the mortgagee has no right to go behind the mortgagor to ascertain who is beneficially interested (*h*).

If A. concur with B. in a mortgage of Whiteacre to C., and afterwards B. mortgage Blackacre to C. for a different sum, nevertheless A. and those claiming under him may redeem Whiteacre without also redeeming Blackacre (*i*). So if A., the owner of Whiteacre, and B., the owner of Blackacre, join in conveying the two estates in one mortgage, and A. afterwards mortgage Whiteacre to the same party for a different sum, B. may redeem on payment of the first mortgage debt (*k*).

And if A., having already mortgaged Whiteacre, join with B., owner of Blackacre, in a mortgage of the two estates for securing a sum lent by the same person to B. (or, as it would seem, to both), B. may redeem his own estate on payment of the sum so lent, without paying off the separate charge on Whiteacre (*l*).

Different mortgagees.

The right to consolidate only arises when the title of the mortgagees in respect to each mortgage is vested in one and the same hand. Consequently there is no such right where one mortgage is to A. and the other is to A. and B. as joint tenants, although there is a possibility of both mortgages becoming vested in A., and though A. could give a good receipt for the moneys secured upon both mortgages (*m*).

Tenants in common.

The same principle applies where the first mortgage by the two persons is of their separate shares of the estate, and subse-

(*f*) *Sober* v. *Kemp*, 6 Ha. 155.
(*g*) *Sharp* v. *Rickards*, (1909) 1 Ch. 109.
(*h*) *Ibid.*
(*i*) *Jones* v. *Smith*, 2 Ves. Jun. 376.
(*k*) *Higgins* v. *Frankis*, 15 L. J. Ch. 329; *Bowker* v. *Bull*, 1 Sim. N. S. 29.
(*l*) *Aldworth* v. *Robinson*, 2 Beav. 287.
(*m*) *Riley* v. *Hall*, 79 L. T. 244.

quent separate mortgages are made by each of his own share: there is no consolidation (*n*).

Voluntary settlement of one estate.

Where an owner in fee of two estates made a voluntary settlement of one of them, and afterwards mortgaged it; he also mortgaged the other estate, and both mortgages became vested in the same person; it was held that the mortgagee was not entitled to consolidate as against the persons claiming under the settlement (*o*).

Tenant for life and remainderman.

On the like principle, where a tenant for life having under a power charged an estate, and then mortgaged the charge and property of his own to several mortgagees, the remainderman can redeem the charge separately from the other estate (*p*).

Case of firm.

So there is no consolidation where one mortgage is by a firm and the other by a member thereof (*q*). Nor conversely where one mortgage is to a firm and the other to a member thereof (*r*).

In one case where a firm, then consisting of two partners, had mortgaged certain partnership property, and, after the admission into partnership of another member, the firm mortgaged other partnership property to the same mortgagee, it was left undecided whether or not there could be consolidation (*s*).

Insurance company.

The circumstance that the mortgages which were consolidated by an insurance company were taken in the names of different trustees was at one time thought to be unimportant (*t*).

Severance of mortgagee's interest.

iv.—Loss of the Right to Consolidate.—If two properties are mortgaged by the same mortgagor to the same mortgagee, and the mortgages become vested in different assignees of the mortgagee, the right to consolidate is gone, and the mortgagor may redeem the securities separately (*u*).

Cesser of one mortgage.

Similarly, the right to consolidate will be lost where one mortgage has ceased to exist, as where a mortgaged leasehold has become vested in the lessor through forfeiture on bankruptcy (*x*).

(*n*) *Thorneycroft* v. *Crockett*, 2 H. L. C. 239.

(*o*) *Re Walhampton Estate*, 26 Ch. D. 391.

(*p*) *Lord Kensington* v. *Bouverie*, 7 H. L. C. 557.

(*q*) *Cummins* v. *Fletcher*, 14 Ch. D. 699, C. A., per James, L.J., questioning *Beevor* v. *Luck*, L. R. 4 Eq. 537.

(*r*) *Riley* v. *Hall*, *sup.*

(*s*) *Re Raggett, Exp. Williams*, 16 Ch. D. 117, C. A.

(*t*) *Tassel* v. *Smith*, 2 De G. & J. 713; overruled, *Jennings* v. *Jordan*, 6 App. Ca. 698.

(*u*) Ca. & Op. M. S. 78.

(*x*) *Re Raggett*, 16 Ch. D. 117, C. A.; *Re Gregson, Christison* v. *Bolam*, 36 Ch. D. 223, 226. See *Mayor of Brecon* v. *Seymour*, 26 Beav. 548.

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Principle of rules.

The principle of these rules is thus stated by Sir H. Cotton, L.J. (*y*): "The mortgagee's right is only to retain both properties so long as he is able to reconvey both to the mortgagor and, if he voluntarily parts with one, his right ceases."

Notice to pay off.

Where a mortgagee holding several mortgages made by the same mortgagor has the right to consolidate, he will not lose that right by giving notice to the mortgagor to pay off one of the mortgages (*z*).

Difference between the former and present law as to consolidation.

v.—**Effect of Conveyancing Act, 1881, sect. 17.**—The right of a mortgagee to consolidate his original security with other securities held or acquired by him in certain cases, so as to give him a further charge on property not included in his original security, was formerly, as a general rule, a right incident to the contract of mortgage. Now, however, by the Conveyancing Act, 1881 (*a*), so far as relates to mortgages which, or one of which, are or is made on or after the 1st January, 1882, no right of consolidation can arise in the absence of a contrary intention expressed in the mortgages or in one of them made on or after that date.

Conv. Act, 1881, s. 17.

By sect. 17 of that Act it is enacted as follows:—

Restriction on consolidation of mortgages.

"(1.) A mortgagor seeking to redeem any one mortgage, shall, by virtue of this Act, be entitled to do so, without paying any money due under any separate mortgage made by him, or by any person through whom he claims, on property other than that comprised in the mortgage which he seeks to redeem.

"(2.) This section applies only if and as far as a contrary intention is not expressed in the mortgage deeds or one of them.

"(3.) This section applies only where the mortgages or one of them are or is made after the commencement of this Act."

Effect of this enactment.

The effect of this section is that there will be no consolidation except where the Act is expressly excluded; the result being to substitute consolidation by contract in place of consolidation by law. A contract affirming the right to consolidate must be clear and explicit in its terms (*b*). The section applies only to cases where the several mortgages include or relate to different properties (*c*). It seems to be the usual practice to

(*y*) *Re Raggett*, 16 Ch. D. at p. 120.
(*z*) *Griffith* v. *Pound*, 45 Ch. D. 553.
(*a*) 44 & 45 Vict. c. 41.
(*b*) *Bird* v. *Wenn*, 33 Ch. D. 215.
(*c*) *Re Salmon*. (1903) 1 K. B. 147.

insert a clause excluding the section (*d*); but it is submitted that in ordinary cases a mortgagee should be content to rely on his original security, and that the right to consolidate should not be reserved except in special cases, as, for instance, loans to builders, where it is intended to make numerous advances.

Although the section only speaks of a mortgagor seeking to redeem, a puisne mortgagee is governed by the same rule (*e*).

An agreement to execute a legal mortgage with such powers and provisions as the mortgagee may require for securing the mortgage debt does not entitle the mortgagee to have inserted a clause excluding the operation of the section (*f*).

If one mortgage excludes the section, any number of other mortgages which do not exclude it may be consolidated therewith; and this right will not be lost by giving notice to pay off one of them (*g*).

(*d*) 3 Ch. D. at p. 217.

(*e*) *Hughes* v. *Britannia Bldg. Soc.*, (1906) 2 Ch. 607, 611.

(*f*) *Farmer* v. *Pitt*, (1902) 1 Ch. 954.

(*g*) *Griffith* v. *Pound*, 45 Ch. D. 553; *Re Salmon*, *sup.*

CHAPTER XLIV.

REMEDIES OF MORTGAGEES FOR ENFORCING SECURITIES GENERALLY.

i.—All Remedies may be pursued at once.—Mortgagees are generally armed, by virtue of the express terms of the instrument creating their security, or by statutory enactments to be hereafter considered, with powers of sale and appointing receivers for the purpose of enforcing or protecting their securities.

Remedies of mortgagee.

The remedies open to a mortgagee for these purposes in respect of which he requires the assistance of the Court, are as follows:—he may, in a proper case, obtain an order for the appointment of a receiver; or he may bring an action against the mortgagor personally on the covenant for payment of principal and interest; or he may bring an action for foreclosure and recovery of possession or sale of the mortgaged property.

If the mortgagor becomes bankrupt, or, if he dies and an action is brought for the administration of the estate, or, in the case of a company, upon a winding up, the law provides means for enforcing the mortgagee's security, which will be hereafter considered.

Mortgagee may have recourse to several remedies at once.

A privilege is annexed to the mortgagee's estate which forms an exception to the general rule against multiplicity of suits; for a mortgagee may at the same time proceed on all his remedies (*a*), unless he has agreed to suspend any particular remedy (*b*); he may at the same moment bring his action for the land and proceed on his bond or covenant and other collateral securities, and for foreclosure, and since the Judicature

(*a*) *Burnell* v. *Martin*, Doug. 417; *Schoole* v. *Sall*, 1 Sch. & L. 176; *Lockhart* v. *Hardy*, 9 Beav. 349; *Rees* v. *Parkinson*, 2 Anst. 497; *Duncan* v. *Manchester Water Works*, 8 Pri. 697; *Re Kelday, Exp. Meston*, W. N. (1888) 94; 36 W. R. 585, C. A.; but see *Williams* v. *Hunt*, *post*, p. 897.

(*b*) *Cockell* v. *Bacon*, 10 Beav. 158. See *Serrao* v. *Noel*, 15 Q. B. D. 549, C. A. (consent order).

Act in the same action (*c*). This right is exerciseable not only as against the mortgagor himself, but as against a subsequent incumbrancer or assignee (*d*).

So also a mortgagee who has sold the mortgaged property under his power of sale may sue the mortgagor on his covenant for the balance (*e*), or proceed to recover it by enforcing any collateral securities which he may hold (*f*).

In like manner a pawnee may hold the pawn whilst suing the pawnor (*g*).

So, also, if mortgaged property is sold by order of the Court (*h*), and the proceeds of sale are insufficient to satisfy the amount due for principal, interest, and costs, the mortgagee may sue on the covenant for the deficiency (*i*). Similarly, where mortgaged property is sold in an action for the administration of an insolvent mortgagor's estate, the mortgagee may prove for the deficiency (*k*).

The power of imprisonment, which is vested in the Court by the Debtors Act, 1869, on default in payment of any debt in pursuance of an order of Court or judgment, does not operate as a satisfaction or extinguishment of the debt, or deprive any person of the right to take out execution against the lands, goods, or chattels of the person imprisoned (*l*).

Under the former practice a mortgagee was not precluded from bringing an ejectment at law, though at the same time he had a bill for foreclosure pending in equity (*m*).

But a mortgagee cannot, without the leave of the Court, exercise his power of sale after an order *nisi* for foreclosure (*n*).

Several actions.

An incumbrancer may bring two suits under certain circumstances; thus, suppose a mortgage on real estate, and a derivative mortgage thereof be made, the original mortgagee may bring two suits, one for redemption and one for foreclosure, and neither could be stayed (*o*); and a mortgagee may, after a

(*c*) 36 & 37 Vict. c. 66, s. 24.
(*d*) *Cockell* v. *Bacon*, 16 Beav. 158.
(*e*) *Rudge* v. *Richens*, L. R. 8 C. P. 358.
(*f*) See *Lockhart* v. *Hardy*, 9 Beav. 349, where the mortgage was in the form of a trust for sale.
(*g*) Story, Bailm. s. 315.
(*h*) As to sale in lieu of foreclosure, see *post*, Chap. XLIX., Sect. II. (ii).
(*i*) *Wilson* v. *Lady Dunsany*, 18 Beav. 293.
(*k*) *Re Talbot, King* v. *Chick*, 39 Ch. D. 567; *Re London, &c. Hotels Co.*, (1892) 1 Ch. 639.
(*l*) 32 & 33 Vict. c. 62, s. 5.
(*m*) *Booth* v. *Booth*, 2 Atk. 343.
(*n*) *Stevens* v. *Theatres, Ltd.*, (1903) 1 Ch. 857.
(*o*) *Gage* v. *Lord Stafford*, 1 Ves. Sen. 545.

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decree for redemption, bring an action for foreclosure, unless it is done merely to accumulate expenses (*p*).

If a mortgagee of one estate contract with the mortgagor for the purchase of that estate or another, he cannot be delayed in recovering his mortgage debt until a good title can be made and an account taken between him and the mortgagor (*q*).

Execution on judgment.

The Court would not prevent a mortgagee from taking out execution upon a judgment recovered by him in an action of covenant, upon the ground that the mortgagee has already contracted to sell the property for a larger sum, but the validity of which contract the mortgagor had filed a bill to impeach (*r*).

So, also, an order for sale of the mortgaged property does not prevent the mortgagee from issuing execution on a personal judgment obtained for payment of the mortgage moneys (*s*).

Sub-mortgage.

An original mortgagee who has made a sub-mortgage will not be restrained from suing his mortgagor, if the sub-mortgagee holds him to the debt secured by the sub-mortgage; he must, however, undertake to pay what he recovers from his mortgagor to his sub-mortgagee (*t*).

A prior incumbrancer is not bound to go in under a decree obtained by a puisne incumbrancer for an inquiry as to incumbrances: he may bring an action of his own (*u*).

Administration action does not prevent other remedies.

A mortgagee is not prevented by an administration suit from proceeding with his remedies against the mortgaged premises, although there is an inquiry in the administration suit respecting the mortgage (*x*).

Action to complete mortgage.

An equitable mortgagee may bring an action to compel a conveyance to himself of the legal estate or otherwise for the perfecting of his security, and so facilitating the exercise of his remedies; and he may do so even after a tender, if the proper notice had not been given, or even after notice, if the sum tendered be considered insufficient, though at the peril of costs if it turn out that a proper amount was tendered, unless there be such a complete offer to pay all that shall be found due, as will enable the Court to decree foreclosure in case of

(*p*) *Shepherd* v. *Titley*, 2 Atk. 348; *Grugeon* v. *Gerrard*, 4 Y. & C. Ex. 119, 128. See *Dunstan* v. *Paterson*, 2 Ph. 341.

(*q*) *Pell* v. *Stephens*, 2 My. & K. 334, 339.

(*r*) *Willis* v. *Levett*, 1 De G. & S. 392.

(*s*) *Re Kelday, Exp. Meston*, 36 W. R. 585, C. A.

(*t*) *Gurney* v. *Seppings*, 2 Ph. 40.

(*u*) *Arnold* v. *Bainbridge*, 2 De G. F. & J. 92.

(*x*) *Crowle* v. *Russell*, 4 C. P. D. 186.

non-payment in pursuance of the offer (*y*). And for the purpose of enforcing his security upon the interest of his mortgagor in an agreement, he may sue for specific performance of the agreement (*z*).

Mortgagee of trust property not a *cestui que trust*.

Where trustees under the terms of their trust raise money by mortgage, the mortgagee is not an object of the trust further than as their trust enabled the trustees to make him a good mortgage; in other respects he is in the ordinary situation of a mortgagee with all the remedies, but only the remedies of a mortgagee; and accordingly he has no right to call upon the trustees to sell in order to pay him (*a*).

Interpleader.

Where the title to the equity of redemption, or the right to the possession of the title deeds is disputed, the mortgagee may interplead (*b*); and the same rule will hold good with regard to the holder of a charge or lien upon goods (*c*), but not if the lien attaches upon one only of the parties by whom the goods are claimed (*d*).

Suing *in formâ pauperis*.

Either a mortgagee (*e*) or a mortgagor (*f*) may sue *in formâ pauperis*.

ii.—When Mortgagee will be precluded from exercising all his Remedies.—There are, however, some exceptions to this general right of the mortgagee to use all his remedies. Thus a mortgagee cannot bring an action in the King's Bench Division to recover the amount due under the covenant in the mortgage deed while there is pending in the Chancery Division a foreclosure action, although the writ in the latter action contain no claim for payment of principal and interest (*g*).

Annuitant.

So where an annuitant has a special remedy by entry and distress, either expressly or under 4 Geo. II. c. 28, and the rents of the estate are sufficient to answer the annuity, he will

(*y*) *Grugeon* v. *Gerrard*, 4 Y. & C. Ex. 119; *Malone* v. *Geraghty*, 1 H. L. C. 81. And see *Sporle* v. *Whayman*, 20 Beav. 607.

(*z*) *Browne* v. *London Necropolis, &c. Co.*, 6 W. R. 188.

(*a*) *Palk* v. *Lord Clinton*, 12 Ves. 48, 56. See *Page* v. *Cooper*, 16 Beav. 396.

(*b*) *Shotbolt* v. *Biscow*, 2 Eq. Ca. Abr. 173; *Roberts* v. *Ball*, 7 E. & B. 323.

(*c*) *Cotter* v. *Bank of England*, 3 Moo. & Sc. 180. See *Attenborough* v. *London & St. Katharine Dock Co.*, 3 C. P. D. 450, C. A.

(*d*) *Braddick* v. *Smith*, 2 Moo. & Sc. 131.

(*e*) *Anon.*, 2 Moll. 338.

(*f*) *Perry* v. *Walker*, 1 Y. & C. C. C. 676.

(*g*) *Williams* v. *Hunt*, (1905) 1 K. B. 512, following *Poulett* v. *Hill*, (1893) 1 Ch. 277.

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not be allowed to pursue the more burdensome remedy of a suit in equity (*h*).

Proceedings abroad.

An injunction was granted restraining mortgagees of a West India estate from proceeding by bill of foreclosure in a colonial Court, after a decree for an account on bill filed in England to redeem; all the parties being in England (*i*). Where a mortgage is made of property abroad, and proceedings are taken in the foreign tribunal, the proceedings will not be restrained by injunction if the party seeking the injunction can appear there and assert his rights, or the mortgagor, a company, is in course of winding up (*k*).

But a mortgagee has been restrained from proceeding in a foreclosure suit in a colonial Court, commenced after a decree directing inquiries and accounts in an English suit for redemption, all the parties being in England. The plaintiff in the English suit was, however, put upon terms to submit to such orders in the colonial Court as the English Court should think reasonable (*l*).

The Court refused to dissolve an injunction restraining the mortgagee of a Demerara estate from proceeding in an action on a promissory note for payment of an instalment of the mortgage money, unless the mortgagee gave security to account for what he so recovered, in case the mortgagor was damnified by the mortgagee not producing the "grosse" copy of the act of hypothecation, the production of which the mortgagor asserted to be necessary for his discharge (*m*).

Further action after amount claimed is paid.

Where an action was brought and the mortgagee was paid all that he claimed, he could not sue in equity for a further sum unclaimed by mistake in the action (*n*). Nor could a building society who had by mistake given the usual statutory receipt (*o*).

Action by mortgagee in breach of good faith.

The mortgagee may use such remedies as will give him the easiest relief, unless the pursuit of the remedy is contrary to the spirit of the contract and in breach of good faith; as where the creditor sued upon an implied contract to recover a debt, when

(*h*) *Buxton* v. *Monkhouse*, G. Coop. 41; *Sollory* v. *Leaver*, L. R. 9 Eq. 22; *Kelsey* v. *Kelsey*, L. R. 17 Eq. 495.

(*i*) *Beckford* v. *Kemble*, 1 S. & St. 7; *Carron Iron Co.* v. *Maclaren*, L. R. 5 H. L. 437.

(*k*) *Moor* v. *Anglo-Italian Bank*, 10 Ch. D. 681.

(*l*) *Beckford* v. *Kemble*, *sup.*

(*m*) *Bentinck* v. *Willink*, 2 Ha. 1.

(*n*) *Darlow* v. *Cooper*, 34 Beav. 281.

(*o*) *Harvey* v. *Municipal Bldg. Soc.*, 26 C. D. 273.

the intention was only to enter up judgment upon a warrant of attorney (*p*). But it will not be considered a breach of good faith if the strict term of a contract is enforced; as where the creditor agreed not to enter up judgment on a warrant of attorney, if the premiums of a policy of insurance were punctually paid, and default being made in such payment, judgment was entered up (*q*).

So a creditor could not prove under an inspectorship deed, and receive dividends on his whole debt and retain the security of a policy, when upon the general construction of the deed the whole matter was to be dealt with as in bankruptcy (*r*).

Alteration of mortgagee's rights by subsequent contract.

Again, the mortgagee will be controlled in his remedies, if by subsequent contract with the mortgagor the respective relations of the mortgagor and mortgagee have been altered, or if rights have been conferred by the mortgagor on third persons, and the mortgagee has done acts which amount to an acknowledgment of such rights; as when rights have been created by a canal company, as mortgagor (*s*), or rights of burial granted by the mortgagor of a burial ground within the objects to which it was devoted (*t*).

Effect of order for foreclosure absolute.

If a mortgagee, before having recourse to any other remedies, commences an action for foreclosure and obtains a decree absolute, he will not be allowed to sue the mortgagor upon the covenant and also to make the mortgaged estate his own by means of the foreclosure, even though the value of the property turns out to be insufficient to cover the debt. So, a mortgagee will not generally be allowed, after foreclosure, to come in under an administration suit, and prove for the deficiency (*u*); but a mortgagee, after foreclosure and attempted sale, was admitted to prove in an administration suit upon giving up the property, but was not allowed the costs of foreclosure (*x*). The effect of an action on the covenant brought by a mortgagee after foreclosure is to revive the right of redemption (*y*). If the mortgagee enters into possession under a foreclosure

(*p*) *Sherborne* v. *Tollemache*, 13 C. B. N. S. 742.

(*q*) *Winthrop* v. *Murray*, 8 Ha. 214. See *Parry* v. *Great Ship Co.*, 4 B. & S. 556.

(*r*) *Kingsford* v. *Swinford*, 4 Drew. 705.

(*s*) *Mold* v. *Wheatcroft*, 27 Beav. 510.

(*t*) *Moreland* v. *Richardson*, 24 Beav. 33.

(*u*) *Lockhart* v. *Hardy*, 9 Beav. 349.

(*x*) *Haynes* v. *Haynes*, 3 Jur. N. S. 504.

(*y*) *Dashwood* v. *Blithway*, 1 Eq. Ca. Ab. 317; *Tooke* v. *Hartley*, 2 Bro. C. C. 125; *Booth* v. *Booth*, 2 Atk. 344.

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and sells the property, thereby precluding the mortgagor from opening the foreclosure, he will not be allowed to sue the mortgagor for any part of the mortgage debt, though the sale may have produced less than the amount due (*z*). This rule will not, however, apply where the mortgagee has obtained an order for sale in lieu of foreclosure which has not been acted upon (*a*).

Accordingly, the most prudent course for a mortgagee whose security is insufficient to cover the debt is first to enforce his personal remedies against the mortgagor, and then to resort to the mortgaged estate for the unsatisfied balance, if any, of the debt.

iii.—Staying Proceedings.—The mortgagor may, under 7 Geo. II. c. 20 (*b*), stay any action brought by the mortgagee by paying the money claimed.

This statute does not take away any right of action—it only stays an action on certain terms, and has no application when the mortgage has been paid off before action brought (*c*).

A judge at chambers has authority to make an order under the statute as well as the Court (*d*).

Covenants are within the Act.

An action "brought on any bond" for the purposes of this Act includes an action on the covenant for payment contained in a mortgage deed (*e*).

Consolidation and tacking.

If there be other mortgages on other lands, the mortgagor cannot proceed under this statute without redeeming all (*f*), unless the case falls within sect. 17 of the Conveyancing Act, 1881 (*g*), or unless the right to consolidate has accrued since the entry for trial (*h*), or without payment of other moneys which may be tacked (*i*).

Reconveyance.

It was held in one case that, where a mortgagor has stayed proceedings under this Act, the mortgagee is bound to reconvey and to deliver up the title deeds, upon payment of the

(*z*) *Perry* v. *Barker*, 8 Ves. 527; *S. C.*, 13 Ves. 198; *Palmer* v. *Hendrie*, 27 Beav. 349; *Burrell* v. *Smith*, L. R. 7 Eq. 399.

(*a*) *Re Kelday, Exp. Meston*, W. N. (1888) 94; 36 W. R. 585.

(*b*) Similar provisions were contained in the stat. 15 & 16 Vict. c. 76, ss. 219—221, some of which sections are now repealed.

(*c*) *Smeeton* v. *Collier*, 5 D. & L. 184. See Jud. Act, 1873 (36 & 37 Vict. c. 66), s. 39.

(*d*) *Sands to Thompson*, 22 Ch. D. 614, 618.

(*e*) *Dixon* v. *Wigram*, 2 Cr. & J. 613; *Smeeton* v. *Collier*, 5 D. & L. 184.

(*f*) *Roe* v. *Soley*, 2 W. Bl. 726.

(*g*) 44 & 45 Vict. c. 41.

(*h*) *Matthews* v. *Antrobus*, 49 L. J. Ch. 80.

(*i*) *Felton* v. *Ash*, Barnes, 177. See *Goodright* v. *Moore*, Barnes, 176; *Vaughan* v. *Lloyd*, cited 7 Ves. 489.

principal money and interest and costs of the action pending, without regard to any expenses which the mortgagee might have previously incurred in trying to effect a sale, or in recovering possession, &c. (*k*). In another case, however, the Court held that the mortgagor must pay the additional expenses as well as the cost of the reconveyance, before he can claim the estate and title deeds (*l*).

Debt payable by instalments.

Where the debt is payable by instalments, and on one default the whole becomes due, relief is given only upon payment of the whole (*m*).

What actions may be stayed.

As all Divisions of the High Court are now competent to exercise both legal and equitable jurisdiction, it is clear that an application to stay proceedings under this Act may be brought in any Division whatever the nature of the action may be, provided it is brought by the mortgagee in his character as such.

No order to prejudice other parties.

No order will be made to the prejudice of other defendants; so where a mortgagee brought an action against the mortgagor and several puisne mortgagees, the Court, having regard to the rights of all parties, refused a stay of proceedings, but directed an inquiry as to priorities (*n*).

Grounds for refusing order.

The application must be made before the mortgagee is entitled to sue out execution (*o*), and will not be granted if the mortgagor is in contempt (*p*).

Contract by mortgagor to sell to mortgagee.

If a mortgagor contracts to sell to the mortgagee his equity of redemption, and the mortgagee, before the completion of the contract, proceeds by ejectment to evict the mortgagor from the possession, the Court will not stay the proceedings on tender of principal, interest, and costs, as the mortgagor has no longer any right to redeem, and equity will decree him to complete the contract (*q*).

Right to redeem disputed.

It has been held that the effect of sect. 3 is to render the statute not applicable where the right to redeem is disputed upon the affidavits, but only where the right to redeem is clear (*r*).

(*k*) *Smeeton* v. *Collier*, 5 D. & L. 184.

(*l*) *Sutton* v. *Rawlings*, 18 L. J. Ex. 249. See *Dowle* v. *Neale*, 10 W. R. 627.

(*m*) *Goodtitle* v. *Notitle*, 11 Moo. 491.

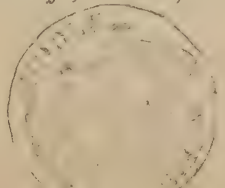
(*n*) *Paine* v. *Edwards*, 8 Jur. N. S. 1201; *Lastett* v. *Cliffe*, 5 Jur. 403.

(*o*) *Amis* v. *Lloyd*, 3 V. & B. 15.

(*p*) *Hewitt* v. *M'Cartney*, 13 Ves. 560.

(*q*) *Goodtitle* v. *Pope*, 7 T. R. 186; *Skinner* v. *Stacey*, 1 Wils. K. B. 80.

(*r*) *Goodtitle* v. *Bishop*, 1 Y. & J. 344; *Doe* v. *Louch*, 6 D. & L. 270.



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The reference to Chambers under this statute must proceed on an admission that the principal and interest claimed are due (*s*).

There must be admission of debt.

Also of plaintiff's title.

It is necessary that all the defendants to the foreclosure suit should admit the plaintiff's title (*t*); and an infant defendant will not be bound by an order under this Act (*u*); though in certain cases a similar order may be obtained under the general jurisdiction of the Court of equity, where one of the parties is an infant (*x*).

Order may be obtained without affidavit.

An order under the statute may be obtained without affidavit by the defendant making the application, although the foreclosure action pray a discovery as to incumbrances, and the defendant will not be required to give the discovery by affidavit (*y*).

The mortgagor is discharged although he has not seen the mortgage money properly laid out (*z*).

Staying proceedings under general jurisdiction.

Independently of the Act payment to the mortgagee or into Court will discharge the mortgagor, so that a foreclosure action cannot be maintained against him (*a*), and proceedings will be stayed on payment into Court by the mortgagor, or a subsequent incumbrancer making the application, of a certain sum on a fixed day (*b*); but where no tender had been made, the Court refused to make any order, on the application of one of such defendants, staying proceedings on payment at a future day, it appearing that the application was made with intent to delay the mortgagee's remedies (*c*).

Where a mortgagee brought a suit for foreclosure against the mortgagors and subsequent incumbrancers, the Court stayed proceedings, under its inherent jurisdiction, on the application of the mortgagors, though they disputed the plaintiff's right to claim the benefit of his security, upon the terms of their paying into Court a sum sufficient to satisfy principal, interest and costs, and undertaking to make good any sums not covered by such payment as might be found due to the plaintiff on taking the accounts, and indemnifying him against any proceedings

(*s*) *Huson* v. *Hewson*, 4 Ves. 105.
(*t*) *Roe* v. *Wardle*, 3 Y. & C. Ex. 70.
(*u*) *Lushington* v. *Price*, 9 Sim. 651; *Taylor* v. *Coates*, 3 Ha. 263.
(*x*) *Grane* v. *Mitchell*, 10 Sim. 484.
(*y*) *Reeves* v. *Glastonbury Canal Co.*, 14 Sim. 351.
(*z*) *Bourton* v. *Williams*, L. R. 5 Ch. 657.
(*a*) *Ibid.*, L. R. 5 Ch. 655; and see O. XXII. 1.
(*b*) *Jones* v. *Tinney*, Kay, App. xlv.; *Challie* v. *Gwynne*, Kay, App. xlvi.
(*c*) *Paynter* v. *Carew*, Kay, App. xxxvi.

which might be taken by any party for redemption of the plaintiff's mortgage (*d*).

Where the taking of the account under a foreclosure decree would clearly produce only vexation and expense, the security being insufficient, the action will be stayed (*e*).

The mere fact that an order for sale has been made is not equivalent to a stay of execution on a personal judgment for the mortgage debt (*f*).

Debentures.

iv.—Remedies of Debenture Holders generally.—The remedies of debenture holders of companies not being companies incorporated for purposes of a public nature are personal judgment, sale or foreclosure, receiver and winding-up.

Action on covenant by trustees for debenture holders.

Where bonds are issued payable to bearer, and the property of the company was vested in trustees to secure the bonds with interest, but the covenants were made with the trustees only, the bondholders were held not to be creditors of the company; they could only put the trustees in motion (*g*); otherwise where the covenants were made directly with the bondholders by the company (*h*).

What may be recovered by debenture holder in action on covenant.

A debenture holder cannot obtain personal judgment against the company for a larger amount than is owing to himself, nor for that amount, as he would thus be placed in a better position than his co-debenture holders, but he may sue on behalf of himself and all the other debenture holders, and obtain a declaration that the debenture holders are entitled to stand in the position of judgment creditors for principal and interest due, and to have a receiver appointed of property not charged by the debentures (*i*).

Ballot for payment.

Where debentures contained a covenant for payment, but with a proviso that the debentures to be paid off should be determined by ballot, it was held that the debentures were presently payable, and that the proviso was void for repugnancy (*k*).

Enforcing security before winding-up.

A mortgagee of property belonging to a company or a debenture holder may, at any time before the commencement

(*d*) *France* v. *Cowper*, W. N. (1871) 76.

(*e*) *Exchange and Hop Co.* v. *Ass. of Financiers*, 34 Ch. D. 195.

(*f*) *Re Kelday, Exp. Meston*, 36 W. R. 585.

(*g*) *Re Uruguay, &c. Rail. Co.*, 11 Ch. D. 372.

(*h*) *Re Olathe Silver Mining Co.*, 27 Ch. D. 278.

(*i*) *Hope* v. *Croydon & Norwood Tramways Co.*, 34 Ch. D. 730.

(*k*) *Re Tewkesbury Gas Co.*, (1912) 1 Ch. 1.

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of the winding-up of the company, bring an action to enforce payment of the mortgage moneys or realize his securities (*l*), subject to the protection from foreclosure or sale of the undertaking of a railway or other public company (*m*), or he may generally present a petition to wind up the company (*n*).

Receiver.

So, also, a debenture holder may apply for the appointment of a receiver of the profits of the undertaking, if the property is in jeopardy, even though the principal is not immediately payable and default has not been made in payment of interest (*o*).

Debenture holder cannot bind others by agreement.

A debenture holder does not, by suing on behalf of himself and all other debenture holders, empower himself to represent the other debenture holders for the purpose of binding them by any agreement with respect to the subject-matter of the action (*p*).

Sale.

A debenture holder's right to a sale may be qualified by the trust deed or conditions, as, for instance, where his right is conditional upon his giving notice to the trustees (*q*).

A sale may be ordered before judgment, and also after judgment before all the persons interested are ascertained, whether served or not (*r*), and may also be made out of Court (*s*).

The question as to the enforcement by a mortgagee of his remedies under his security, after an order for winding-up the company, will be considered in a subsequent chapter (*t*).

(*l*) *Re Panama, &c. Royal Mail Co.*, L. R. 5 Ch. 318.
(*m*) See *post*, Chap. XLIX., Sect. I. (ii).
(*n*) See *post*, Chap. LIII.
(*o*) See *post*, Chap. XLVI., Sect. II. (iii).
(*p*) *Securities, &c. Investment Co.* v. *Brighton Alhambra*, 62 L. J. Ch. 516.
(*q*) *Rogers* v. *British and Colonial Ass.*, 68 L. J. Q. B. 14.
(*r*) Ord. LI. r. 1B.
(*s*) *Ibid.* r. 1A.
(*t*) *Post*, Chap. LIII.

CHAPTER XLV.

POWERS OF SALE.

SECTION I.

MORTGAGEE'S RIGHT OF SALE UNDER EXPRESS AND STATUTORY POWERS.

i.—Express Powers of, and Trusts for Sale in Mortgages.—Mortgagees generally have a right to sell the mortgaged property on default of payment at the time limited by the mortgage deed. Formerly, in order to give this right, it was necessary that express powers conferring the right should have been inserted in the deed, but a power of sale is now implied by statute in every mortgage made by deed. Apart, however, from statutory powers, a mortgage of land implies no power of sale (*a*), though in a mortgage of shares or personal chattels a power of sale is implied (*b*).

This right to sell may be expressly conferred on a mortgagee either by means of a trust for re-conveyance on payment of the mortgage moneys on the day appointed, and, in default of such payment, for sale; or by means of an ordinary mortgage, to which a power of sale is attached among other provisions intended to arm the mortgagee with special remedies without the necessity of an application to the Court.

Either a trust or power of sale will enable the mortgagee to sell the estate at any time after default, without notice to the mortgagor, unless the terms of the security make the trust or power exerciseable only upon such notice (*c*).

The modes of framing a trust for sale by way of security are various. In some instances, the estate is limited to the use of the mortgagee for a term of years, with the usual proviso for redemption, and subject thereto, to the use of trustees in fee

(*a*) *Re Rumney and Smith*, (1897) 2 Ch. 351.
(*b*) *Deverges* v. *Sandeman*, (1902) 1 Ch. 579.
(*c*) *Hawkins* v. *Ramsbottom*, 1 Pri. 138.

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upon trust to sell. In other instances, it is limited at once to trustees in fee in trust to sell if the money is not paid at a given day, and the proviso for redemption is also inserted. In other instances, it is limited to the mortgagee in fee upon trust to sell if the money is not paid as in the preceding instance (*d*). Of these forms the last is to be preferred, as the necessity for the intervention of third persons may cause delay and inconvenience. In a case where the right to sell was vested in a trustee, the Court granted an injunction to restrain the sale where it would not have restrained the mortgagee himself, on the ground that it was the duty of the trustee to attend equally to the interests of both parties (*e*). A security by way of trust for sale is not a "trust" for the mortgagor, but a mortgage, within the meaning and for the purposes of the Statute of Limitations (*f*).

Form of power.

The usual mode of giving to a mortgagee a right to sell, is to limit the property to him in fee, or for the interest intended to be assured, with the usual proviso for redemption, and a declaration that if default is made in payment on the day appointed, it shall be lawful for the mortgagee, his executors, administrators, or assigns, to sell the property.

Power does not prevent foreclosure.

Formerly, a proviso was sometimes added that such power of sale should not prejudice the right of foreclosure; but this is superfluous and has become obsolete (*g*). The power of sale in a mortgage is an additional remedy in the hands of the mortgagee, and does not interfere with his right to foreclose (*h*). On breach of the proviso for redemption the limitations to the mortgagee bestow on him an absolute estate; and the power enables him, after giving such notice (if any) as is provided by the terms of the mortgage, to sell the property while leaving open to him the option, in the meantime, of bringing his action to foreclose.

Nor does foreclosure extinguish power.

On the other hand, an order *nisi* for foreclosure does not preclude the mortgagee from exercising his power of sale with the leave of the Court. The power is suspended only, not extin-

(*d*) *Re Alison, inf.*

(*e*) *Anon.*, 6 Madd. 10. See also *Ord* v. *Noel*, 5 Madd. 438.

(*f*) *Kirkwood* v. *Thompson*, 2 De G. J. & S. 617; *Locking* v. *Parker*, L. R. 8 Ch. 30; *Re Alison, Johnson* v. *Mounsey*, 11 Ch. D. 284, C. A.; *Warner* v. *Jacob*, 20 Ch. D. 220; *Re Metropolis, &c. Bldg. Soc.*, (1911) 1 Ch. 698.

(*g*) And see Conv. Act, 1881, s. 21 (5), *post*, p. 910.

(*h*) *Exp. Davis, Re Hayley*, 3 D. & C. 504.

guished, and a *bonâ fide* purchaser without notice may get a good title under the power (*i*).

Power and legal estate.

What is called a power of sale in a mortgage is nothing but an authority to defeat the equity of redemption, and when the mortgagee sells he transfers the legal estate not by means of the power but by virtue of the legal ownership (*k*).

ii.—Powers of Sale under Lord Cranworth's Act.—By sect. 11 of this statute (*l*), powers of sale are conferred on mortgagees unless such powers are negatived by express declaration in the mortgage deed, and may be exercised in manner provided by sects. 12 to 16 inclusive, subject to any variations or limitations of the powers contained in the deed.

By sect. 11, it is enacted as follows:—

Powers incident to mortgages.

"Where any principal money is secured or charged by deed on any hereditaments of any tenure, the person to whom such money shall be for the time being payable, his executors, administrators, and assigns, shall, at any time after the expiration of one year from the time when such principal money shall have become payable according to the terms of the deed, or after any interest on such principal money shall have been in arrear for six months, or after any omission to pay any premium on any insurance which by the terms of the deed ought to be paid by the person entitled to the property subject to the charge, have the following powers to the same extent (but no more) as if they had been in terms conferred by the person creating the charge; namely,—

"1st. A power to sell, or concur with any other person in selling, the whole or any part of the property by public auction or private contract, subject to any reasonable conditions he may think fit to make, and to rescind or vary contracts for sale, or buy in and resell the property from time to time in like manner" (*m*).

Provisions as to exercise of powers.

Sect. 12 of this Act relates to receipts for purchase-money. Sect. 13 relates to the notice to be given before sale and the relief of a purchaser from inquiry. Sect. 14 provides for the application of the purchase-money. Sect. 15 gives power to convey property sold. Sect. 16 empowers the owner of the charge to call for the legal estate and title deeds. These

(*i*) *Stevens* v. *Theatres, Lim.*, (1903) 1 Ch. 857.

(*k*) *Re Harwood*, 35 C. D. 470, per Cotton, L.J.

(*l*) 23 & 24 Vict. c. 145.

(*m*) The other powers conferred by this section relate to insurance against fire, as to which see *ante*, p. 144, and appointment of a receiver, as to which see *post*, p. 949.

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sections will be further considered in the following pages of this chapter.

By sect. 24, it is enacted that—

This part to relate to charges by way of mortgage only.

"The powers and provisions contained in this part of this Act relate only to mortgages and charges made to secure money advanced or to be advanced by way of loan, or to secure an existing or a future debt."

The powers of sale conferred on mortgages by this Act were in many respects less favourable to mortgagees than the express powers usually inserted in mortgage deeds, and were accordingly seldom relied on in practice.

Sects. 11 to 30, inclusive, of Lord Cranworth's Act are repealed by the Conveyancing Act, 1881 (*n*), but not so as to affect the validity or invalidity, or any operation, effect, or consequence of any instrument executed or made, or of anything done or suffered before the commencement of the repealing Act. The powers of sale given by Lord Cranworth's Act in cases of mortgages made prior to 1882 are thus not affected by the repeal of the Act, but are preserved to their full extent (*o*).

iii.—Powers of Sale under the Conveyancing Act, 1881.—By the Conveyancing Act it is enacted as follows:—

Power of sale incident to estate and interest of mortgagee.

Sect. 19.—"(1.) A mortgagee, where the mortgage is made by deed, shall, by virtue of this Act, have the following powers, to the like extent as if they had been in terms conferred by the mortgage deed, but no further, (namely):

"(i.) A power, when the mortgage money has become due, to sell, or to concur with any other person in selling, the mortgaged property, or any part thereof, either subject to prior charges, or not, and either together or in lots, by public auction or by private contract, subject to such conditions respecting title, or evidence of title, or other matter, as he (the mortgagee) thinks fit, with power to vary any contract for sale, and to buy in at an auction, or to rescind any contract for sale, and to resell, without being answerable for any loss occasioned thereby; and (*p*)

(*n*) 44 & 45 Vict. c. 41, s. 71, and Sched. ii. pt. 3. The remainder of the Act is repealed by the statute 45 & 46 Vict. c. 38, s. 64.

(*o*) See *Re Solomon and Meagher's Contract*, 40 Ch. D. 508.

(*p*) The remaining clauses of this sub-section refer to insurance against fire, as to which see *ante*, p. 144; the appointment of a receiver, as to which see *post*, p. 949; and the right of a mortgagee in possession to fell timber, as to which see *ante*, p. 830.

"(2.) The provisions of this Act relating to the foregoing powers, comprised either in this section, or in any subsequent section regulating the exercise of those powers, may be varied or extended by the mortgage deed, and, as so varied or extended, shall, as far as may be, operate in the like manner and with all the like incidents, effects, and consequences, as if such variations or extensions were contained in this Act.

"(3.) This section applies only if and as far as a contrary intention is not expressed in the mortgage deed, and shall have effect subject to the terms of the mortgage deed and to the provisions therein contained.

"(4.) This section applies only where the mortgage deed is executed after the commencement of this Act."

The statutory powers of mortgagees under this Act only apply to mortgages made by deed. No power of sale under this Act therefore attaches to an equitable mortgage by mere deposit of deeds; and if such deposit is accompanied by a memorandum of charge not under seal, it is still necessary, in order that the mortgagee should have power to sell, that such power should be given to him expressly or by implication. But a memorandum of deposit under seal, though not strictly a deed, would apparently suffice to confer the power of sale, though not a power to convey the legal estate (*q*).

A power of sale will apparently be implied in the case of an agreement not under seal, to execute a legal mortgage with power of sale (*r*).

Debentures.

The statutory power of sale is not exerciseable by debenture holders (*s*).

Copyholds.

No power of sale by virtue of this Act attaches to a mortgage of copyholds made by surrender, which is effectual not by deed but by entry on the court rolls; but if there is an antecedent deed of covenant to surrender, or an accompanying deed of covenants for payment, &c., the statutory power may be imported into that deed by inserting therein a clause expressly charging the copyholds with the mortgage moneys.

Property in British colonies.

The insertion of express powers of sale will still be necessary in mortgages of property situated in British colonies or dependencies, where powers of sale are not impliedly imported into such securities by virtue of any statute or otherwise.

(*q*) *Re Hodson and Howe*, 35 Ch. D. 668. And see 41 Ch. D. at p. 406.

(*r*) *Lister* v. *Turner*, 5 Ha. 281.

(*s*) *Blaker* v. *Herts and Essex Waterworks Co.*, 41 Ch. D. 399.

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By sect. 21 of the Act of 1881 it is enacted that—

Foreclosure.

"(5.) The power of sale conferred by the Act shall not affect the right of foreclosure."

Conv. Act, 1911.

The power of sale conferred by sect. 19 of the Act of 1881 has been extended by the Conveyancing Act, 1911, s. 4, which provides as follows:

Sect. 4.—"(1.) The power of sale conferred on a mortgagee by sect. 19 of the Act of 1881 shall include the following powers as incident thereto (namely):—

(i.) A power to impose or reserve or make binding, as far as the law permits, by covenant, condition, or otherwise, on the unsold part of the mortgaged property or any part thereof, or on the purchaser and any property sold, any restriction or reservation with respect to building on or other user of land, or with respect to mines and minerals, or for the purpose of the more beneficial working thereof, or with respect to any other thing:

(ii.) A power to sell the mortgaged property, or any part thereof, or any mines and minerals apart from the surface:—

(a) With or without a grant or reservation of rights of way, rights of water, easements, rights, and privileges for or connected with building or other purposes in relation to the property remaining in mortgage or any part thereof, or to any property sold;

(b) With or without an exception or reservation of all or any of the mines and minerals in or under the mortgaged property, and with or without a grant or reservation of powers of working, wayleaves, or rights of way, rights of water and drainage and other powers, easements, rights, and privileges for or connected with mining purposes in relation to the property remaining unsold or any part thereof, or to any property sold;

(c) With or without covenants by the purchaser to expend money on the land sold.

"(2.) Sub-sects. (2) and (3) of sect. 19 of the Act of 1881 shall apply to the foregoing powers conferred by this section.

"(3.) This section applies only where the mortgage deed is executed after the commencement of this Act.

"(4.) For the purpose of exercising any power conferred by this section, an application under sect. 44 of the Trustee Act, 1893, as amended by sect. 3 of the Trustee Act, 1894, shall not be required."

iv.—Powers of Sale under the Land Transfer Acts, 1875 and 1897.—In the case of a charge registered under these Acts (*t*) it is enacted as follows:—

Remedy of proprietor of charge with power of sale.

Sect. 27. "Subject to any entry to the contrary on the register, the registered proprietor of a registered charge with a power of sale may, at any time after the expiration of the appointed time, sell and transfer the land on which he has a registered charge or any part thereof, in the same manner as if he were the registered proprietor of such land."

By sect. 68 of the Act of 1875 it is enacted as follows:—

Trustees, &c. may sell by medium of registry.

"Any person holding land on trust for sale, and any trustee, mortgagee, or other person having a power of selling land, may authorize the purchaser to make an application to be registered as first proprietor, with any title which a proprietor is authorized to be registered with under this Act, and may consent to the performance of the contract being conditional on his being so registered, or may himself apply to be registered as such proprietor, with the consent of the persons, if any, whose consent is required to the exercise by the applicant of his trust or power of sale; and the amount of all costs, charges, and expenses, properly incurred by such person in or about such application, shall in all cases be ascertained and declared by the registrar, and shall be deemed to be costs, charges, and expenses, properly incurred by such person in the execution of his trust or in pursuance of his power; and such person may retain or reimburse the same to himself out of any money coming to him under the trust or power; and he shall not be liable to any account in equity in respect thereof."

Statutory powers attaching to mortgage deeds do not apply to registered charges.

The powers of sale given to mortgagees by the Act of 1875 are confined to cases of registered charges with a power of sale. Inasmuch as the statutory powers of sale given either by Lord Cranworth's Act or by the Conveyancing Act, 1881, only arise where the mortgage is made by deed, it is clear that unless a charge was expressly registered with a power of sale, the mortgagee had no such power under the Act of 1875. But by the Land Transfer Act, 1897 (*u*), the provisions of sects. 19, 20, 21 (except sub-sects. 1 and 4), 22, 23, and 24 of the Conveyancing Act, 1881, shall apply to registered charges.

On a sale under a mortgage of unregistered land which has been registered after the date of the mortgage the mortgagee is bound at his own expense to be registered as proprietor of

(*t*) See *ante*, p. 48.

(*u*) 60 & 61 Vict. c. 65, s. 9 (2).

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the mortgage or to procure a registered transfer to the purchaser from the registered proprietor (*x*).

But this does not apply where leasehold land is registered after a mortgage by sub-demise, and in such a case the mortgagee selling under his power of sale cannot be required to be registered or to procure a transfer (*y*).

Section II.

Exercise of Powers of Sale by Mortgagees.

Proper mode of limiting power.

i.—**By what Persons Powers of Sale are exerciseable.**—An express power of sale in a mortgage deed is properly limited to the executors and administrators of the mortgagee, for the heirs are in no way interested in the money. The word "assigns" should never be omitted (*z*).

Mortgagee with absolute possessory title.

The power or trust for sale can be exercised by the mortgagee, or by the trustee for sale on behalf of the mortgagee, although the right to redeem is barred by adverse possession; for if he does not sell under his power, he may not be able to prove that there had been no acknowledgment; but a mortgagee so selling is nevertheless deemed to be the absolute owner of the estate so as to entitle him to the whole of the proceeds of sale (*a*).

Equitable mortgagee under agreement for mortgage.

If a borrower agrees to execute a legal mortgage, a power of sale contained in such mortgage will be valid as against a person who has purchased the equity of redemption from the mortgagor before he executed the mortgage deed pursuant to the agreement (*b*).

Transferee of mortgage.

The power of sale may be exercised by the transferee of a mortgage, although the mortgagor joined in the transfer, and the amount of the debt and the time of payment were changed (*c*).

A power of sale, given in a mortgage deed, will not, it seems,

(*x*) Land Transfer Act, 1897, s. 16 (2).

(*y*) *Re Voss and Saunders*, (1911) 1 Ch. 42.

(*z*) See *infra*, p. 916.

(*a*) *Re Alison, Johnson* v. *Mounsey*, 11 Ch. D. 284, C. A.

(*b*) *Leigh* v. *Lloyd*, 35 Beav. 455.

(*c*) *Young* v. *Roberts*, 15 Beav. 558; *Boyd* v. *Petrie*, L. R. 7 Ch. 385.

be implied in a subsequent deed executed before 1882, by which the interest then due is turned into principal and the total amount charged afresh on the premises (*d*). Such a deed, however, would clearly be a mortgage within the definition of that expression contained in the Conveyancing Act, 1881 (*e*).

Sub-mortgagee.

In a sub-mortgage it is usual expressly to pass to the sub-mortgagee the benefit of the power of sale contained or implied by statute in the original mortgage. Having regard, however, to the definition of property in the Conveyancing Act, 1881 (*f*), as including any debt and any thing in action and any other "*right* or interest," it would seem that the mortgaged property would comprise the original mortgage debt and all rights incident thereto, including among such rights the right to enforce and exercise all securities, powers and remedies given by the mortgage, whether expressly mentioned or not. Moreover, the sub-mortgagee being by virtue of the assignment of the debt the "person for the time being entitled to receive and give discharges for the purchase-money" clearly appears to be the proper person to exercise the statutory power. Accordingly it would seem that if the sub-mortgagor makes default, the sub-mortgagee by virtue of the statutory power of sale implied in his own security may sell the original debt, thereby extinguishing the sub-mortgagor's right of redemption therein and the benefit of the original security, so as in effect to make the purchaser a transferee of the original mortgage. But if the original mortgagor should also have made default, the sub-mortgagee will also be entitled to put in force the power of sale incident to the original mortgage by selling the property comprised in that mortgage, so as to extinguish the mortgagor's equity of redemption though he was not a party to the sub-mortgage.

It would seem that if a mortgagee sub-mortgages, transferring to the sub-mortgagee the benefit of a power of sale contained in the original mortgage, the power will no longer be exerciseable by the original mortgage (*g*); and, *quære*, whether the original mortgagee can, even with the sub-mortgagee's consent, himself exercise the power (*h*).

(*d*) *Curling* v. *Shuttleworth*, 6 Bing. 121.
(*e*) 44 & 45 Vict. c. 41, s. 2 (i).
(*f*) 44 & 45 Vict. c. 41, s. 2 (i).
(*g*) *Cruse* v. *Nowell*, 25 L. J. Ch. 709.
(*h*) See *Re Richards*, 45 Ch. D. 589; *Hopkins* v. *Hemsworth*, (1898) 2 Ch. 347.

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Who may sell under Lord Cranworth's Act.

Who may sell under Conveyancing, &c. Act, 1881.

The powers of sale conferred by Lord Cranworth's Act are exerciseable only by the holder of a mortgage or charge created by deed to secure a present or future loan or debt (*i*).

The powers conferred by the Conveyancing Act, 1881, are exerciseable by any mortgagee whose security is created by deed, that is to say, the holder of "any charge on any property for securing money or money's worth," including "any person from time to time deriving title under the mortgagee" (*k*).

Equitable charge under seal.

The statutory powers of sale for the time being in force, will accordingly be exerciseable by the holder of a merely equitable charge created by an instrument under seal (*l*), who could, under Lord Cranworth's Act, convey the legal estate (*m*), but the Conveyancing Act, 1881, s. 21, confers no such power (*n*).

Bill of sale.

The statutory powers of sale are not incorporated by the form given in the schedule to the Bills of Sale Act, 1882 (*o*), and are not exerciseable by the holder of a bill of sale of chattels.

Debentures.

These powers do not apply in the case of debentures in the ordinary form not containing an express power of sale given by a company (*p*).

Over what property the statutory powers extend.

Lord Cranworth's Act did not enable a mortgagee of personalty to sell under the powers conferred by that Act which applied only to hereditaments. The powers of sale conferred by the present Act apply to any mortgaged "property," including in that expression "real and personal property and any estate or interest in any property, real or personal, and any debt, and any thing in action, and any other right or interest" (*q*).

Joint mortgagees.

Where moneys are advanced by several mortgagees, with an express proviso that the moneys belong to them on a joint account, the survivors or survivor can sell under the power (*r*). And in the case of a mortgage made since 1881, the same rule would apply, though no such proviso is inserted in the deed (*s*).

Formerly, however, in the absence of a joint account clause, the survivors or survivor of several mortgagees could not effectually exercise the power of sale, even though the proceeds of

(*i*) See *ante*, p. 907.
(*k*) 44 & 45 Vict. c. 41, s. 2 (vi).
(*l*) *Re Solomon and Meagher's Contract*, 40 Ch. D. 508.
(*m*) *Ibid.*
(*n*) *Re Hodson and Howes' Contract*, 35 Ch. D. 668.
(*o*) See *ante*, p. 249.
(*p*) *Blaker* v. *Herts Waterworks Co.*, 41 Ch. D. 399; *Marshall* v. *South Staffordshire Tramways Co.*, (1895) 2 Ch. 36, at p. 53, C. A.
(*q*) 44 & 45 Vict. c. 41, s. 2 (i).
(*r*) *Hinde* v. *Poole*, 1 K. & J. 383.
(*s*) See 44 & 45 Vict. c. 41, s. 61, set out *ante*, p. 550.

sale were directed to be paid to them or the survivors or survivor of them (*t*).

Trustees for sale.

It would seem clear that the rule would be different in the case of trustees selling under their trust where the security, made prior to 1882, is by way of trust for sale.

Where a testator devised all his real estate to three trustees, their executors, administrators, and assigns, with power to sell or mortgage the estate as if the testator were living, the Court appears to have considered the trustees to have been invested with a trust, and not a power, and that a sale could be made by a sole continuing trustee (one having disclaimed, and the other died), whatever might be the doubt in cases of powers (*u*).

Rule since 1882.

As regards trusts for sale created since 1881, no question arises on this point, for by the Trustee Act, 1893 (*x*), s. 22 (1), it is enacted that:—

Power of two or more trustees.

"Where a power or trust is given to or vested in two or more trustees jointly, then unless the contrary is expressed in the instrument, if any, creating the power or trust, the same may be exercised or performed by the survivors or survivor of them for the time being."

Several sets of mortgagees.

Where a mortgage is made to several mortgagees to secure distinct sums advanced to them, a special clause should be inserted in the mortgage deed as to the persons by whom the powers of sale, whether express or statutory, may be exercised; otherwise, it would seem that all the mortgagees and the legal personal representatives of such as should be dead must concur in exercising the powers (*y*).

First and second mortgagees.

Where first and second mortgagees alike have powers of sale and of giving receipts, both may concur in selling where it is clearly beneficial to do so, but they must see that the purchase-money is properly apportioned (*z*).

Assigns of mortgagee.

It is important that an express power of sale in a mortgage

(*t*) *Townsend* v. *Wilson*, 1 B. & Ald. 608; *Hall* v. *Dewes*, Jac. 189.

(*u*) *Watson* v. *Pearson*, 18 L. J. Ex. 46. See *Warburton* v. *Sandys*, 14 Sim. 622; *Lane* v. *Debenham*, 11 Ha. 188; *Re Cooke's Contract*, 4 Ch. D. 454 (all these are decisions arising under wills).

(*x*) 56 & 57 Vict. c. 53, re-enacting 44 & 45 Vict. c. 41, s. 38, so far as it relates to trustees.

(*y*) See Wolst. (8th ed.) p. 69. And see *Blaker* v. *Herts and Essex Waterworks Co.*, 41 Ch. D. 399.

(*z*) *M'Carogher* v. *Whieldon*, 34 Beav. 107; *Gutteridge* v. *Fletcher*, 13 W. R. 540; *Re Cooper's Contract*, 4 Ch. D. 802.

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deed should be so framed as to be reserved in terms to the assigns of the person or persons in whom the power is vested, so as to enable an assignee of the mortgage effectually to exercise the power (*a*). For, otherwise, he is unable to exercise the power, and the circumstance that the assigns are empowered to give a receipt to a purchaser has been held, according to the strict construction that has been applied to these powers, not to extend the power of sale to them (*b*).

Where, in a mortgage made prior to 1882 (*c*), the power of sale is not expressly given to assigns, it has been repeatedly held that the devisee of a mortgagee, or of the survivor of several mortgagees, cannot exercise the power and make a good title to a purchaser; or, in other words, that the power cannot be delegated by will, unless the assigns are mentioned in the power itself (*d*).

In the case of *Osborne to Rowlett* (*e*), Sir G. Jessel, M.R., after reviewing the authorities, and pointing out that the above rule, as laid down in *Cooke* v. *Crawford* (*f*), and other cases, had been sometimes disapproved of, even when followed, refused to be bound by the rule; but in the subsequent case of *Re Morton and Hellett* (*g*), James and Baggallay, L.JJ., expressed their dissent from this view. If *Cooke* v. *Crawford* is good law, as it seems to be, then it is doubtful whether *Re Osborne and Rowlett* can be so also (*h*). This rule must, therefore, be regarded as still in force as regards express powers of sale in mortgages.

As regards sales under statutory powers, whether under Lord Cranworth's Act or the Conveyancing Act, 1881, no question of this kind can arise; for such powers are exercisable under the former Act "by the person to whom the principal money secured shall for the time being be payable, his

(*a*) *Titley* v. *Wolstenholme*, 7 Beav. 425; *Hall* v. *May*, 3 K. & J. 585; *Ockleston* v. *Heap*, 1 De G. & S. 640; *Ashton* v. *Wood*, 3 Sm. & G. 436. See Sug. Pow. 133.

(*b*) *Bradford* v. *Belfield*, 2 Sim. 264; *Re Rumney and Smith*, (1897) 2 Ch. 351, C. A.

(*c*) See as to the devolution of mortgage estates, *ante*, pp. 859 *et seq.*

(*d*) *Cooke* v. *Crawford*, 13 Sim. 91; *Cole* v. *Wade*, 16 Ves. 27; *Wilson* v. *Bennett*, 5 De G. & S. 475; *Macdonald* v. *Walker*, 14 Beav. 556; *Stevens* v. *Austen*, 3 E. & E. 685; *Re Burtt*, 1 Drew. 319.

(*e*) 13 Ch. D. 774.

(*f*) 13 Sim. 91.

(*g*) 15 Ch. D. 145, C. A. See *Re Rumney and Smith*, (1897) 2 Ch. 351, C. A.

(*h*) *Re Crunden and Meux*, (1909) 1 Ch. 690.

executors, administrators, and assigns"; and by the latter Act it is enacted:— Chap. XLV. § 2 (i.)

Sect. 21 (4). "The power of sale conferred by this Act may be exercised by any person for the time being entitled to receive and give a discharge for the mortgage money."

The section refers to the executors, administrators and assigns of the mortgagee, and does not extend to a person entitled to give a discharge as agent (*i*).

Where the power was to the mortgagee, his heirs, executors, administrators and assigns, and the mortgage was assigned and the legal estate conveyed by the heir of the assignee to a trustee for the administrator of the assignee, it was held that the latter could sell; the legal representatives of an "assign" are "assigns" (*k*).

Mode of framing express powers of sale in mortgages.

Having regard to the conflict of authority as to the persons by whom powers of sale are to be deemed to be exerciseable, the proper course in framing an express power of sale is to give the power to the mortgagee, his executors, administrators, or assigns, or where there are several mortgagees, to the mortgagees, or the survivors or survivor of them, or the executors or administrators of such survivor, their or his assigns, and to declare that any person or persons entitled to give a discharge for the mortgage money may exercise the power of sale; this provides in the most convenient manner for the devolution of the power, where the legal and equitable title to the money becomes separated; as for instance, when the money is settled, as well as where the title to the money and the legal estate in the mortgaged property become vested in different persons (*l*).

Sale by agent of mortgagee under power of attorney.

It seems clear that a power of sale, whether expressly given by a mortgage or implied by statute, may be exercised by attorney of the mortgagee, whether he acts under a special power of attorney stating the mortgagee's intention to enforce his security by sale, and merely delegating to the attorney the power to do ministerial acts as regards conducting the sale, and conveying the property to a purchaser (*m*), or whether

(*i*) *Re Dowson and Jenkins' Contract*, (1904) 2 Ch. 219.

(*k*) *Saloway* v. *Strawbridge*, 7 De G. M. & G. 594.

(*l*) Dav. Conv. Vol. ii. pt. ii. p. 676.

(*m*) See *Offen* v. *Harman*, 29 L. J. Ch. 307; *Rowley* v. *Adams*, 14 Beav. 130.

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he acts under a power of attorney in general terms, authorizing him to sell and transfer property held by his principal as mortgagee or otherwise, and to execute any deeds necessary for that purpose (*n*). No doubt, the exercise of a mortgagee's power of sale is not a purely ministerial act, but involves to some extent personal discretion in deciding to enforce the security by this particular remedy, as well as in choosing the time for sale, fixing the reserve price, and in respect of other matters relating to the conduct of the sale. But, as will be seen presently, the power of sale is deemed to be given to the mortgagee for his own benefit, and in no sense as a trustee for sale, except as regards surplus proceeds of sale (*o*), a person having an absolute power may exercise it by attorney (*p*); and the mortgagor is in no way prejudiced by the delegation of the power, as if it should be improperly exercised, the mortgagee acting by his attorney will be liable in damages no less than if he had himself sold under the power of sale (*q*).

It is a general rule of law that an agent in order to bind by deed, must have authority by deed (*r*); and it has been held that a mere authority in writing not under seal though sufficient to enable the attorney to sell lands will not enable him to convey them to a purchaser (*s*).

Concurrence of mortgagor in sale not necessary.

Doubts were formerly entertained of the validity of an exercise of these powers of sale without the concurrence of the mortgagor, or the sanction of the Court; but it is now well established, that a mortgagee can make a perfect title to the purchaser without the concurrence of the mortgagor (*t*).

The concurrence of the mortgagor cannot be required by a purchaser, although there be an express covenant on his part to join in the sale, and an action brought by a purchaser to compel the mortgagor to concur in the conveyance will be dismissed with costs; and if a purchaser refuses to complete by reason of the mortgagor not concurring, specific performance will be decreed against him *with costs* (*u*).

(*n*) *Re Dowson and Jenkins, sup.*

(*o*) See *inf.* p. 928.

(*p*) *Combe's Case,* 9 Rep. 75. See also *White* v. *Wilson,* 1 Drew. 304.

(*q*) See Story on Agency, ss. 452 *et seq.*

(*r*) *Berkeley* v. *Hardy,* 5 B. & C. 355.

(*s*) *Hesse* v. *Bryant,* 2 Jur. N. S. 922.

(*t*) *Corder* v. *Morgan,* 18 Ves. 344; *Alexander* v. *Crosby,* 1 J. & L. 666, 670.

(*u*) *Corder* v. *Morgan, sup.*

ii.—In what Events Powers of Sale become exerciseable—Notice—Protection of Purchasers. Where a condition is imposed on the mortgagee before he can exercise his power of sale, he will be restrained if the condition is not performed by him (*x*). Where a mortgage to secure an account current with a bank contains a power of sale to arise on the closing of the account, the account is closed by a letter from the mortgagor to the bank stating that he has agreed to assign all his assets to a trustee for creditors (*y*).

Conditions must be observed.

In cases unaffected by the Conveyancing Act, 1881, s. 19, the law is that a mortgagee of stock or shares may sell the same at any time after the day originally fixed for payment of the loan, or if no day was fixed then after reasonable notice has been given to the mortgagor and default made by him in payment after such notice (*z*).

Implied power.

According to the usual practice in framing express powers of sale, the power of sale was made exerciseable at any time or times after the day fixed by the mortgage deed for payment of the principal, and accordingly was not exerciseable before that date. By the Conveyancing Act, 1881, s. 19, the power is exerciseable "when the mortgage money has become *due*," by which is presumably meant payable by the terms of the mortgage deed. Under Lord Cranworth's Act, a mortgagee could not sell until after the expiration of one year from the time when the principal had become payable according to the terms of the deed, or unless interest was in arrear for six months or there had been a breach of a covenant to insure against fire. Other conditions precedent to the exercise of the power of sale are imposed both by the terms of express powers in the usual form and by the statutory provisions giving powers of sale to mortgagees.

Power not exerciseable till default.

It is usual in express powers to stipulate (amongst other conditions) that the power of sale shall not be exercised until after the expiration of a certain notice, or unless interest has fallen into arrear for a certain time (usually three calendar months).

Usual conditions in express powers.

It has been held that a power to sell without notice is of an oppressive character in a mortgage of a reversionary interest by

Power to sell without notice deemed oppressive.

(*x*) *Gill* v. *Newton*, 12 Jur. N. S. 920.

(*y*) *Berry* v. *Halifax Commercial Banking Co.*, (1901) 1 Ch. 188.

(*z*) *Deverges* v. *Sandeman, Clark & Co.*, (1902) 1 Ch. 579, C. A.

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a person of necessitous circumstances (*a*); and also in a mortgage by a client to his solicitor unless it is clearly explained to the mortgagor that the power was not in the usual form (*b*).

It is, however, permissible to provide that the power of sale conferred by the Conveyancing Act shall be exercised without the restrictions as to notice imposed by sect. 20 of that Act (*c*).

Conditions under Lord Cranworth's Act.

By Lord Cranworth's Act, no sale could be effected under the statutory power even, as it would seem, though interest was in arrear and there had been a breach of covenant to insure, until after six months' notice in writing of the intention to sell had been given to the mortgagor or affixed on some conspicuous part of the mortgaged property (*d*).

Conv., &c. Act, 1881, s. 20.

With regard to notice of sale, the Conveyancing Act, 1881, enacts as follows:—

Regulation of exercise of power of sale.

Sect. 20. "A mortgagee shall not exercise the power of sale conferred by this Act unless and until—

(i.) Notice requiring payment of the mortgage money has been served on the mortgagor or one of several mortgagors, and default has been made in payment of the mortgage money, or of part thereof, for three months after such service; or

(ii.) Some interest under the mortgage is in arrear and unpaid for two months after becoming due; or

(iii.) There has been a breach of some provision contained in the mortgage deed or in this Act, and on the part of the mortgagor, or of some person concurring in making the mortgage, to be observed or performed, other than and besides a covenant for payment of the mortgage money or interest thereof."

The three months' default mentioned in the section begins to run from the service of the notice and not from any date fixed by such notice for payment. A notice, therefore, requiring payment in three months and not immediately is a good notice under the Act (*e*).

Conditional contract for

A mortgagee with a power of sale may, before the expiration

(*a*) *Miller* v. *Cook*, L. R. 10 Eq. 641. Cf. *Deverges* v. *Sandeman & Co.*, (1902) 1 Ch. 579, C. A.

(*b*) *Cockburn* v. *Edwards*, 18 Ch. D. 449, C. A. But see *Pooley's Trustee* v. *Whetham*, 33 Ch. D. 111, where under special circumstances a power to sell without notice was upheld. See *ante*, p. 631.

(*c*) *Re Morritt, Exp. Official Receiver*, 18 Q. B. D. 222.

(*d*) 23 & 24 Vict. c. 145, s. 13.

(*e*) *Barker* v. *Illingworth*, (1908) 2 Ch. 20, distinguishing *Selwyn* v. *Garfit*, 38 Ch. D. 273.

of the notice, enter into a conditional agreement to sell the property, if not redeemed meanwhile (*f*).

sale before expiration of notice.

The notice required by the power of sale need only be given to the mortgagor or those claiming under him, and need not be given to persons who claim adversely to the mortgagor, but to whose title the mortgage is paramount, even though such persons may have a right to redeem, and to require an account of the proceeds of the sale (*g*). Where the notice was to be given to the mortgagor or his assigns, a second mortgagee to whom no notice was given was held entitled to damages (*h*).

To whom notice must be given.

When mortgagor is under disability.

A notice served on the infant heir and his guardian was held sufficient (*i*). And it is unnecessary to provide that the notice shall be valid notwithstanding the disability of the person on whom it is served (*k*).

If there be no person in existence to whom, under the terms of the power, notice should be given, the power cannot be exercised (*l*).

Notice by solicitor.

Where the notice is to be given under the hand of the mortgagee, it seems doubtful whether a letter of the solicitor is enough (*m*).

Trustee for sale bound to give notice.

Where a power of sale was vested in a trustee, an injunction was granted against proceeding to a sale, on the ground that reasonable notice of the intended sale had not been given to the mortgagor (*n*), the trustee being bound to attend to the interests of both parties, though, as it would seem, the deed contained no provisions as to notice before exercising the power.

No period of notice specified.

Where an express power of sale is exerciseable upon default after notice to pay, without specifying any period during which the notice is to run, the mortgagor will be entitled to reasonable notice (*o*).

Withdrawal of notice.

Where notice to pay off has been given to the mortgagor, the mortgagee is not entitled to withdraw the notice without the mortgagor's consent (*p*).

(*f*) *Major* v. *Ward*, 5 Ha. 598.

(*g*) *Ibid.* See *Hawkins* v. *Ramsbottom*, 1 Pri. 138.

(*h*) *Hoole* v. *Smith*, 17 Ch. D. 434.

(*i*) *Tracey* v. *Lawrence*, 2 Drew. 403; *Woods* v. *Hyde*, 10 W. R. 339; *Reeves* v. *Baker*, 18 Beav. 372; 18 Jur. 588.

(*k*) *Ibid.*; *Robertson* v. *Lockie*, 15 L. J. Ch. 379, a case of insanity.

(*l*) *Parkinson* v. *Hanbury*, L. R. 2 H. L. 1.

(*m*) 1 Sug. Pow. (7th ed.) 253.

(*n*) *Anon.*, 6 Madd. 10.

(*o*) *Massey* v. *Sladen*, L. R. 4 Ex. 13. Cf. *Deverges* v. *Sandeman & Co.*, (1902) 1 Ch. 579.

(*p*) *Santley* v. *Wilde*, (1899) 1 Ch. 747.

Where the parties entitled to the exercise of the power have waived the default, a fresh notice is necessary (*q*).

Fresh notice after waiver.

What length of notice usually to be given under express powers.

The notice prescribed in express powers is generally of six calendar months. A month in law is, *primâ facie*, a lunar month, or twenty-eight days (*r*). But in mortgage transactions, a month means a calendar month. It has been so decided in case of a foreclosure (*s*), and was so considered (though, under the circumstances, it was not necessary to decide the point), upon a covenant in a mortgage to pay the money at the end of six months (*t*); and the same rule would, apparently, be applied to any other computation of time relating to mortgages. The practice of conveyancers, however, is to specify calendar months as well in mortgages as in other instruments. In considering what is the length of a calendar month, it is sufficient, when the months are broken, whatever may be the length of either, to go from one day in one month to the corresponding day in the other exclusive of the day of giving notice (*u*).

A six months' notice, served after its date, was held substantially sufficient, where the sale did not take place till after six months from the time of service (*x*); and the fact that the agreement for sale is made before the expiration of the notice is immaterial if the agreement is conditional on non-redemption in the meantime (*y*).

Where notice should be given.

Where the notice is to be left at the last place of abode, fixing it on the door of the house which answers that description is sufficient (*y*).

Where the proviso for redemption was upon payment on demand to be made to the mortgagor, or by leaving notice at his place of business, and the mortgage deed contained a power for the mortgagee to sell on default, it was held, that the mortgagee was bound to give such notice as might reasonably be expected to reach the mortgagor, if absent from his place of

(*q*) *Tommey* v. *White*, 3 H. L. C. 49.

(*r*) 1 Stephen's Comm. (8th ed.) 281. See *Parkinson* v. *Hanbury*, L. R. 2 H. L. 1; *Metters* v. *Brown*, 33 L. J. Ch. 97. The statute 52 & 53 Vict. c. 63 (repealing but virtually re-enacting the provisions of the statute 13 & 14 Vict. c. 21, s. 4), enacts (sect. 3) that in every Act passed after the year 1850, the word "month" shall mean calendar month.

(*s*) *Anon.*, Barn. Ch. R. 324; *Hutton* v. *Brown*, 45 L. T. 343.

(*t*) *Dyke* v. *Sweeting*, Willes, 585, 588.

(*u*) Per Cockburn, C.J., in *Freeman* v. *Read*, 11 W. R. 802. See *Young* v. *Higgon*, 6 M. & W. 49; *Re Railway Sleepers Supply Co.*, 29 Ch. D. 204.

(*x*) *Metters* v. *Brown*, 33 L. J. Ch. 97.

(*y*) *Major* v. *Ward*, 5 Ha. 598.

business, and give him an opportunity of complying with the notice within a reasonable time (*z*).

Regulations as to notices under Conveyancing, &c. Act, 1881.

The statutory power of sale is exerciseable on default in payment of any mortgage moneys within the prescribed time after notice to the mortgagor requiring him to do so. The notice must be in writing, and will be sufficient if addressed to the mortgagor, as such, without naming him, and notwithstanding that he be absent, under disability, unborn or unascertained; and the notice will be sufficiently served if left at the last-known place of abode or business of the mortgagor, or on the mortgaged premises, or if sent in a registered letter through the post; and, in the latter case, the service is deemed to be made when such letter would in the ordinary course be delivered (*a*).

Service of notice.

The notice must be served on the mortgagor or on one of several mortgagors; and the expression "mortgagor" includes "any person from time to time deriving title under the original mortgagor, or entitled to redeem a mortgage, according to his estate, interest, or right in the mortgaged property" (*b*); the expression will thus include an incumbrancer of the equity of redemption.

Where, therefore, a first mortgagee has notice that the equity of redemption has been incumbered, it will apparently be, as a general rule, sufficient for him to give a single notice to the first subsequent incumbrancer of whose security he has notice. Where, however, a mortgage deed contained a power of sale with a proviso that it should not be exercised, except upon notice to the mortgagor "and his assigns," it was held that the mortgagee was liable in damages for selling under his power, after giving notice to the mortgagor only, and not also to the second mortgagee, notice of whose security had been given to the first mortgagee. It was not decided whether notice to the second mortgagee alone would have been sufficient, or whether, if there had been several successive incumbrances, it would have been necessary to give notice to all the incumbrancers (*c*).

Where several mortgagors.

Where there are several mortgagors as joint tenants or tenants in common, notice to one will be sufficient; but where

(*z*) *Massey* v. *Sladen*, L. R. 4 Ex. 13. Cf. *Deverges* v. *Sandeman & Co.*, (1902) 1 Ch. 579, C. A.

(*a*) See sect. 67 of the Act.

(*b*) See s. 2 (vi) of Act.

(*c*) See *Hoole* v. *Smith*, 17 Ch. D. 434.

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several mortgagors have distinct successive interests, as a tenant for life and remainderman, it will be best to give separate notices.

Period of notice.

According to the usual practice in framing express powers of sale, the power was made exerciseable after six months' notice to pay the mortgage debt; but the statutory power is only exerciseable where default has been made in payment for three months after service of the notice. The statutory power, therefore, is only exerciseable after three months' default, and not merely after three months' notice (*d*). The statutory provisions may, however, be modified as to the period of notice as in other respects, if desired. "Month" in an Act of Parliament means calendar month (*e*).

Default in payment of interest.

According to the usual form of express powers of sale, it is provided that the power should not be exerciseable unless some interest should be in arrear, usually for *three* months.

Receipt of rents by mortgagee in possession.

When a mortgagee has entered into possession (*f*), the fact that he has received rents to an amount more than sufficient to keep down the interest will not of itself be sufficient to prove that there was no interest in arrear, if no appropriation is shown to have been made; a mortgagee in possession has first to deduct expenses and outgoings incident to his possession, and what remains goes against principal and interest, but till an account is taken there is no set-off, or appropriation of the rents (*g*).

Interest.

The statutory power is exerciseable if and when some interest under the mortgage is in arrear and unpaid for *two* months after it has become due. This includes an instalment expressed to be for principal and interest combined (*h*).

It has been seen (*i*) that a covenant for payment of mortgage money and interest is not an essential part of a mortgage, but it would seem that, in the absence of a covenant to pay interest, the rate of interest named in the proviso for redemption would be "interest becoming due under the mortgage" (*k*).

Breach of mortgagor's covenants, &c.

The statutory power is also made exerciseable on the breach

(*d*) *Ante*, p. 920.
(*e*) 52 & 53 Vict. c. 63, s. 3.
(*f*) See *ante*, pp. 821 *et seq.*
(*g*) *Cockburn* v. *Edwards*, 18 Ch. D. 449, C. A. See *Wrigley* v. *Gill*, (1906) 1 Ch. 165.
(*h*) *Walsh* v. *Derrick*, 19 T. L. R. 209, C. A.
(*i*) See *ante*, p. 9.
(*k*) See *Cook* v. *Fowler*, L. R. 7 H. L. 27; *Gordillo* v. *Weguelin*, 5 Ch. D. 287, at pp. 297, 301, 302, C. A.; *Re Roberts, Goodchap* v. *Roberts*, 14 Ch. D. 49, at p. 52; *Re Frisby, Allison* v. *Frisby*, 43 Ch. D. 106, at p. 114, C. A.

of some provision contained in the mortgage deed or in the Act, and to be observed or performed by the mortgagor or by some person concurring in the mortgage, other than the covenants for payment of the mortgage moneys or interest. No clause to this effect was ordinarily inserted in express powers of sale.

This extension of the power is of a somewhat stringent character; it will apply to the omission of a mortgagor to insure against fire pursuant to a covenant in the mortgage deed; or, in the case of a mortgage of a life interest and policy of assurance, to a breach of covenant to maintain the policy; or, in the case of a lease by the mortgagor, to his failure to deliver a counterpart of the lease within one month of the making thereof (*l*). And the enactment will apply to a default on the part of a surety in performing or observing his obligations under the mortgage deed.

Appointment of receiver.

The appointment of a receiver by the mortgagee and mortgagor is impliedly subject to the power of sale, and he will be bound to join in conveying to a purchaser from the mortgagee under the power (*m*).

Decree *nisi* for foreclosure.

But after an order *nisi* for foreclosure the mortgagee cannot exercise his power of sale. The power, however, is not extinguished, but the right to exercise it is suspended (*n*).

Purchaser's protection clause in express powers of sale.

Where conditions are imposed upon the exercise by a mortgagee of his power of sale, the right of the mortgagor to restrain a sale on the ground that the conditions have not been complied with is frequently to a great extent neutralized by the insertion of a provision, usually called the "purchaser's protection clause," declaring that, upon any sale purporting to be made in pursuance of the power, the purchaser shall not be bound to inquire whether the conditions have been performed or observed. In such a case the mortgagee can sell, and make a good title to a *bonâ fide* purchaser without notice of the breach of the conditions, and the contract for sale will bind the mortgagor, whose only remedy will be in damages against the mortgagee (*o*); *à fortiori*, if the mortgage deed expressly provides that, in case of impropriety in the sale,

(*l*) See sect. 18, sub-sect. 11, of the Act.

(*m*) *King* v. *Heenan*, 3 De G. M. & G. 890.

(*n*) *Stevens* v. *Theatres, Lim.*, (1903) 1 Ch. 857.

(*o*) *Dicker* v. *Angerstein*, 3 Ch. D. 600. See *Life Interest, &c. Corp.* v. *Hand in Hand Ins. Soc.*, (1898) 2 Ch. 230, and Conv. Act, 1911, s. 5 (1), *inf.*

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by reason of no notice having been given, or otherwise, the mortgagor's remedy shall be in damages only (*p*). If the proviso is to the effect that a purchaser shall not be bound to inquire "whether default has been made in payment of any principal or interest," the sale will be valid, although the mortgage debt has been satisfied at the time of sale, if the purchaser had no notice of the fact (*q*).

Notice of irregularity in sale.

But a proviso relieving a purchaser from inquiry as to whether conditions as to notice, &c. have been observed does not protect him, if he actually knew, or if the circumstances of the case are such that he must be taken to have known, that the proviso was not complied with (*r*).

Protection of purchaser in case of express notice of irregularity.

Sometimes a further proviso is inserted that even express notice that no default has been made, or that other conditions have not been complied with, shall not affect a purchaser (*s*).

23 & 24 Vict. c. 145, s. 13.

With regard to purchasers from mortgagees selling under statutory powers of sale, Lord Cranworth's Act, s. 13, provided that the purchaser's title should not be liable to be impeached by reason of no case for sale having arisen, or no notice having been given; but that the remedy of any person damnified should be in damages against the person selling.

44 & 45 Vict. c. 41, s. 21.

By the Conveyancing Act, 1881, it is enacted as follows:—

Protection of purchasers.

Sect. 21 (2). "Where a conveyance is made in professed exercise of the power of sale conferred by the Act, the title of the purchaser shall not be impeachable on the ground that no case has arisen to authorize the sale, or that due notice was not given, or that the power was otherwise improperly or irregularly exercised; but any person damnified by an unauthorized, or improper, or irregular exercise of the power shall have his remedy in damages against the person exercising the power."

Extent of statutory protection.

As the protection afforded by this sub-section extends only to cases of "professed exercise" of the statutory power, such power should be expressly referred to in the conveyance.

The statutory protection, like that provided by the clause usually inserted in express powers of sale (*t*), extends only to

(*p*) *Prichard* v. *Wilson*, 10 Jur. N. S. 330.
(*q*) *Dicker* v. *Angerstein*, *sup.*
(*r*) *Parkinson* v. *Hanbury*, L. R. 2 H. L. 1; *Selwyn* v. *Garfit*, 38 Ch. D. 273, C. A. See *Bailey* v. *Barnes*, (1894) 1 Ch. 25, C. A.
(*s*) See as to this, *Ford* v. *Heely*, 3 Jur. N. S. 1116.
(*t*) *Sup.* p. 925.

cases where the purchaser has bought without notice, actual or constructive, of the impropriety (*u*).

Jurisdiction of County Courts under s. 21.

The remedy in damages of any "person damnified" may be obtained under this sub-section by means of an action in a County Court under sect. 56 of the County Courts Act, 1888 (*x*), where the amount claimed does not exceed 50*l*. (*y*).

Waiver of notice.

The mortgagor or his assigns may waive the right to notice or to the compliance with any other condition attached to the exercise of the power of sale, and will be bound by such waiver, which may be either express or implied from conduct (*z*). But a purchaser is not entitled to assume that the mortgagor has waived due notice, at least where there are *puisne* incumbrancers (*a*). Nor, on the other hand, is he, in the absence of a protection clause, compellable to go into the question as to the validity of the alleged waiver (*b*).

Purchaser, unless protected, may refuse to complete.

If there is no purchaser's protection clause, or such clause is defective, the purchaser may refuse to complete, until satisfied by sufficient evidence that the conditions of the power have been complied with (*c*); the unsupported declaration of the mortgagee that default has been made in payment of the mortgage debt is not sufficient (*d*).

The section was held not to apply until the conveyance had been obtained, and consequently it did not preclude a purchaser from inquiring whether proper notice had been given under sect. 20, nor from proving *aliunde* that the power of sale had not arisen (*e*).

But the Conveyancing Act, 1911 (*f*), provides as follows:—

Sect. 5 (1). "Upon any sale made in professed exercise of the power conferred on mortgagees by the Act of 1881, a purchaser is not, and never has been, either before or on conveyance, concerned to see or inquire whether a case has arisen to authorize the sale, or due notice has been given, or the power is otherwise properly and regularly exercised."

(*u*) *Bailey* v. *Barnes*, (1894) 1 Ch. 25, C. A.
(*x*) 51 & 52 Vict. c. 43.
(*y*) *Ames* v. *Higdon*, 69 L. T. 292.
(*z*) *Re Thompson and Holt*, 44 Ch. D. 492. See, also, *Selwyn* v. *Garfit*, 38 Ch. D. 273, C. A.
(*a*) *Selwyn* v. *Garfit*, *sup.*
(*b*) *Foster* v. *Hoggart*, 15 Q. B. 155.
(*c*) *Re Edwards and Rudkin to Green*, 58 L. T. 789.
(*d*) *Hobson* v. *Bell*, 2 Beav. 17.
(*e*) *Life Interest, &c. Corp.* v. *Hand in Hand Ins. Soc.*, (1898) 2 Ch. 230.
(*f*) 1 & 2 Geo. V. c. 37, s. 5 (1).

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Conv. Act, s. 70.

A purchaser on a sale made in pursuance of an order made in a foreclosure action is also protected by sect. 70 of the Conveyancing Act, 1881, against want of jurisdiction, concurrence, notice or service, whether he has notice of any such want or not (*g*).

Mortgagee not trustee for mortgagor of power of sale.

iii.—**Conduct of the Sale.**—The only obligation incumbent on a mortgagee selling under a power of sale in his mortgage is that he should act in good faith (*h*). Whether selling under an express or statutory power, he may generally conduct the sale in such manner as he may think most conducive to his own benefit, unless the deed contains any restrictions as to the mode of exercising the power, provided he acts *bonâ fide* and observes reasonable precautions to obtain a proper price (*i*). "A mortgagee is not a trustee of a power of sale for the mortgagor at all; his right is to look after himself first. But he is not at liberty to look after his own interests alone, and it is not right, or proper, or legal, for him, either fraudulently, or wilfully, or recklessly, to sacrifice the property of the mortgagor: that is all" (*k*).

If a mortgagee selling under a power of sale acts in good faith and in compliance with the terms of the power, the mortgagor has no redress, even though more might have been obtained for the property if the sale had been postponed (*l*).

If after notice given to the co-owners of the equity of redemption that he is prepared to sell for the amount of the principal, interest and costs, no objection is taken, he may so sell to one of the co-owners without such co-owner being liable to the other co-owner (*m*).

Even where security is by trust for sale.

A mortgagee exercising his power of sale is not a trustee for the mortgagor, even if the mortgage is in the form of a trust for sale, except as regards the surplus of the purchase-money after his claims are satisfied (*n*).

(*g*) *Re Harrowby and Paine*, W. N. (1902) 137.

(*h*) *Kennedy* v. *De Trafford*, (1897) A. C. 180.

(*i*) *Farrar* v. *Farrars, Limited*, 40 Ch. D. 395, at p. 411, C. A.

(*k*) Per Lindley, L.J., in *Kennedy* v. *De Trafford*, (1896) 1 Ch. 762, at p. 772, C. A., affirmed in D. P., (1897) A. C. 180. See *Warner* v. *Jacob*, 20 Ch. D. 220; *Colson* v. *Williams*, W. N. (1889) 33; *Haddington Island Co.* v. *Huson*, (1911) A. C. 722.

(*l*) *Nutt* v. *Easton*, (1899) 1 Ch. 873, 877, affirmed, (1900) 1 Ch. 29.

(*m*) *Kennedy* v. *De Trafford*, *sup.*; cf. *Bailey* v. *Barnes*, (1894) 1 Ch. 25.

(*n*) *Kirkwood* v. *Thompson*, 2 H. & M. 392; *Locking* v. *Parker*, L. R. 8 Ch. 30; *Re Alison, Johnson* v.

Express powers of sale usually provide that a mortgagee selling thereunder shall not be responsible for any loss occasioned by the exercise of the power; and by the Conveyancing Act, 1881, it is enacted that:—

Protection of mortgagee selling from liability for loss.

Sect. 21 (6). "The mortgagee, his executors, administrators, or assigns, shall not be answerable for any involuntary loss happening in or about the exercise or execution of the power of sale conferred by the Act or of any trust connected therewith (or of any power or provision contained in the mortgage deed)" (*o*).

The section as amended seems to do away with the necessity for the insertion of the usual involuntary losses clause.

Sale by auction or private contract.

Under an express power of sale, in the absence of any special restriction, the mortgagee may sell by auction or private contract; but if either mode of sale is alone specified, the other cannot be resorted to (*p*). Both Lord Cranworth's Act and the Conveyancing Act of 1881 expressly authorize mortgagees selling under the powers given by those respective Acts to sell either by private contract or public auction (*q*).

Advertisement of sale.

A mortgagee selling under his power is under no obligation to advertise the sale (*r*).

Mortgagee cannot sell land and timber separately.

Although, according to the usual form of an express power of sale, and also according to the terms of the statutory power, a mortgagee is empowered to sell the whole or any part of the mortgaged property, he cannot sell separately the timber upon it (*s*). But a sale of the land apart from the timber may, however, be made with the sanction of the Court (*t*).

Whether surface and minerals separately.

A mortgagee selling under his power, unless expressly authorized by the mortgage deed, could not sell the surface apart from the minerals (*u*). By the Confirmation of Sales Act (*x*), mortgagees were empowered, with the like sanction, to effect sales of the surface apart from the minerals, and *vice versâ* (*y*). But

Mounsey, 11 Ch. D. 284; *Nutt* v. *Easton*, *sup.*

(*o*) The words in brackets were added by the Conveyancing Act, 1911, s. 5 (2).

(*p*) 1 Dart (6th ed.), 75; *Brouard* v. *Dumaresque*, 3 Moo. P. C. 457; *Bousfield* v. *Hodges*, 33 Beav. 90.

(*q*) 23 & 24 Vict. c. 145, s. 11; 44 & 45 Vict. c. 41, s. 19 (i).

(*r*) *Smith* v. *Durrant*, 1 De G. & J. 535; appealed to H. L., but not prosecuted, 9 H. L. C. 192.

(*s*) *Cholmeley* v. *Paxton*, 3 Bing. 207; *S. C.*, 5 Bing. 48.

(*t*) 22 & 23 Vict. c. 35, s. 13.

(*u*) *Buckley* v. *Howell*, 29 Beav. 546.

(*x*) 25 & 26 Vict. c. 108, s. 2.

(*y*) *Re Beaumont's Mortgage Trusts*, L. R. 12 Eq. 86; *Re Wilkinson's Mortgaged Estates*, L. R. 13 Eq. 634; *Re Hirst's Mortgage*, 45 Ch. D. 263.

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this Act is wholly repealed by the Trustee Act, 1893 (*z*), which, though it contains a corresponding provision as regards trustees, defines the expression "trust" for the purposes of the Act as not including duties incident to an estate conveyed by way of mortgage; and mortgagees who, as has been seen, are not trustees, do not seem to have been within the purview of that Act. But by the Amendment Act of 1894 (*a*), after the word "trustee" in sect. 44 of the Act of 1893, are to be read the words "or other person;" the effect of which was to replace the Confirmation of Sales Act, s. 2, and to enable the Court to sanction a sale by a mortgagee of the surface of minerals separately. But under the Conveyancing Act, 1911 (*b*), the sanction of the Court is no longer required.

Not machinery apart from buildings.

A mortgagee selling either under an express power in the ordinary form, or under a statutory power, cannot sell trade machinery apart from the mortgaged buildings (*c*).

Easements over land unsold.

Formerly, if he sold only part of the land, he could not grant a new easement over the land unsold (*d*), though he might sell a part with all legal incidents ordinarily accompanying a grant, and so as to pass continuous easements over the unsold portion (*e*).

But now by the Conveyancing Act, 1911 (*f*), he can sell with a reservation of easements.

iv.—Sale under Special Conditions.—The mortgagee with power of sale may sell under special conditions, if not of an unreasonably depreciatory character (*g*), although stringent (*h*).

Power to rescind.

A condition that the vendor may rescind, if unable or unwilling to answer requisitions or objections to title made by the purchaser, is valid (*i*).

Purchaser not to require legal estate outstanding.

Where the legal estate to part of the mortgaged property was outstanding, a condition of sale stating this fact and requiring

(*z*) 56 & 57 Vict. c. 53. See sects. 40, 44 and 51.

(*a*) 57 Vict. c. 10, s. 3.

(*b*) 1 & 2 Geo. V. c. 37, s. 4 (4).

(*c*) *Re Yates, Batcheldor* v. *Yates*, 38 Ch. D. 112; *Small* v. *Nat. Prov. Bank*, (1894) 1 Ch. 686; *Johns* v. *Ware*, (1899) 1 Ch. 359.

(*d*) See *Dayrell* v. *Hoare*, 12 A. & E. 356; approved, (1900) 2 Ch. p. 105.

(*e*) *Born* v. *Turner*, (1900) 2 Ch. 211.

(*f*) 1 & 2 Geo. V. c. 37, s. 4, set out *ante*, p. 910.

(*g*) *Hobson* v. *Bell*, 2 Beav. 17. See *National Bank of Australia* v. *United Hand-in-Hand, &c. Co.*, 4 App. Ca. 392.

(*h*) *Kershaw* v. *Kalow*, 1 Jur. N. S. 974.

(*i*) *Falkner* v. *Equitable, &c. Co.*, 4 Drew. 352.

the purchaser to accept the equitable interest in that part which the mortgagee was able to convey, was held not to be unreasonable under the circumstances (*k*).

Evidence on sale of reversion.

It has been seen that the Court regards mortgages of reversionary interests with peculiar jealousy; and, accordingly, on a sale by a mortgagee of a reversion, a condition that the purchaser should not require any evidence of the age of the tenant for life was held to be improper, and to entitle the mortgagor to set aside the sale (*l*).

Part of price to remain on mortgage.

It has been held that a mortgagee selling under his power may sell upon the terms that part of his purchase-money, or even the whole except the deposit, may remain on mortgage (*m*).

Sale subject to prior mortgage.

Where property subject to a mortgage was conveyed to trustees upon trust for sale, and out of the proceeds to pay off the mortgage, and pay the surplus to the mortgagor, it was held that a sale subject to the mortgage was valid (*n*).

By sect. 19 of the Act of 1881, a mortgagee selling under the statutory power is expressly empowered to sell either subject to prior charges or not.

Sale at undervalue.

v.—**Interference of Court in Sales by Mortgagees.**—The power of sale being given to the mortgagee for his own benefit, it follows that if he exercises it *bonâ fide* for that purpose without corruption or collusion with the purchaser, or such wilful or reckless impropriety as to be tantamount to fraud, the Court will not interfere even though the sale be very disadvantageous, unless, indeed, the price is so low as of itself to be evidence of fraud (*o*).

Trustee for sale.

Where the security was by way of trust for sale, it was said that the trustee was, like any other trustee for sale, specially bound to obtain the best price for the property (*p*); but this distinction would probably not be upheld at the present day (*q*).

(*k*) *Ashworth* v. *Mounsey*, 9 Exch. 175.

(*l*) *Cragg* v. *Alexander*, W. N. (1867) 305.

(*m*) *Thurlow* v. *Mackeson*, L. R. 4 Q. B. 97. See *Davy* v. *Durrant*, 1 De G. & J. 535; *Bettyes* v. *Maynard*, 49 L. T. 389; *Kennedy* v. *De Trafford*, (1896) 1 Ch. 762, affirmed in D. P., (1897) A. C. 180.

(*n*) *Manser* v. *Dix*, 8 De G. M. & G. 703.

(*o*) *Warner* v. *Jacob*, 20 Ch. D. 220, at p. 224; *Martinson* v. *Clowes*, 21 Ch. D. 861; *Nutt* v. *Easton*, (1900) 1 Ch. 29; *Haddington Island Co.* v. *Huson*, (1911) A. C. 722; *ante*, p. 928.

(*p*) See *Harper* v. *Hayes*, 2 Giff. 210.

(*q*) See cases cited *supra*, p. 928, note (*n*).

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Court will not restrain sale in deference to mortgagor's wishes.

The Court will not restrain a sale by a mortgagee under his power merely because it is contrary to the wishes or interest of the mortgagor, even though the latter is willing to pay what is due in order to avert the sale (*r*). Nor will the Court restrain a mortgagee from selling merely because in the notice demanding what is due, a mistake is made as to the amount actually due (*s*).

Nor because liquidator of company might obtain better price.

If a mortgagee or debenture holder having a power of sale wishes to sell, the Court will not interfere with his right to do so, on the alleged ground that the company or its liquidator could realize the property to better advantage (*t*). But where a mortgagee had himself presented a petition to wind up the company, he was restrained from exercising the power of sale under his mortgage until the hearing (*u*).

Setting aside sale.

The Court refused to set aside a sale by a first mortgagee on the ground that, after making preliminary arrangements (but without a binding contract) for an advantageous sale of the property, he bought up the interest of the second mortgagee at a reduced price, without informing him of such arrangements (*x*).

The fact that the mortgagee, acting honestly, represented that the equity of redemption had ceased, or the fact that the mortgagee sold believing himself to be the owner, does not prevent the sale from being a valid exercise of an implied power of sale (*y*).

Oppressive conduct of mortgagee.

But the sale has been set aside as oppressive and irregular, where it was made for a collateral purpose (that of expelling the plaintiff from participation in a newspaper, his shares in which formed the subject of the mortgage), and the mortgagee had himself become owner by means of a subsequent purchase (*z*). And also in a case in which the power was exercised, after a tender of principal and interest (the costs being unascertained), and the facts were known to the purchaser (*a*).

Damages for unreasonable sale.

An action will lie, at the suit of the mortgagor, against the

(*r*) *Jones* v. *Matthie*, 16 L. J. Ch. 405. See *Warner* v. *Jacob*, 20 Ch. D. 220.

(*s*) *Deverges* v. *Sandeman, Clark & Co.*, (1902) 1 Ch. 579.

(*t*) *Re Longdendale Cotton Co.*, 8 Ch. D. 150.

(*u*) *Re Cambrian Mining Co., Exp. Fell*, W. N. (1881) 125.

(*x*) *Dolman* v. *Nokes*, 22 Beav. 402.

(*y*) *Deverges* v. *Sandeman, Clark & Co.*, (1902) 1 Ch. 579.

(*z*) *Robertson* v. *Norris*, 4 Jur. N. S. 443.

(*a*) *Jenkins* v. *Jones*, 2 Giff. 99. See *Hosken* v. *Sincock*, 11 Jur. N. S. 477.

mortgagee for fraudulent or unreasonable exercise of the power (*b*); and the mortgagor is entitled to substantial damages (*c*).

A puisne incumbrancer being entitled to redeem (*d*) is, of course, interested to the extent of the moneys due on his security in the proceeds of sale, but, before the Judicature Acts, he had no remedy at law against the first mortgagee for an improper sale (*e*).

Damages for wilful or reckless sale at undervalue.

A mortgagee is chargeable with the full value of the mortgaged property sold, if, from wilful or reckless want of care and diligence, it has been sold at an undervalue (*f*). So, a mortgagee was held liable for the misdescription in the particulars, by reason of which the purchaser refused to complete without compensation; but the measure of damages was held to be, not the amount of the compensation awarded to the purchaser, but the difference between the price actually realized and that which the property would have realized if there had been no misdescription (*g*).

Damages for wrongful sale of shares.

In the case of a wrongful sale of stock or shares the damages are limited to the value at the date of the sale, less the amount due to the mortgagee, and do not extend to the highest value between the sale and the trial (*h*).

Injunction to restrain sale.

Where sufficient grounds for relief are shown, an injunction will be granted against a mortgagee improperly exercising the power of sale (*i*).

Pleadings.

The pleadings in an action for the purpose of restraining a sale by a mortgagee must clearly disclose the fraud or irregularity in respect of which relief is sought (*k*).

Terms on which injunction granted.

As a general rule, a sale by a mortgagee will be restrained only by actual tender or on payment into court of the amount

(*b*) *Brighty* v. *Norton*, 3 B. & S. 305; *Rogers* v. *Mutton*, 31 L. J. Ex. 275; *Toms* v. *Wilson*, 4 B. & S. 442; *Moore* v. *Shelley*, 8 App. Ca. 285.

(*c*) *Massey* v. *Sladen*, L. R. 4 Ex. 13; *Moore* v. *Shelley*, *sup.*

(*d*) See *ante*, p. 719.

(*e*) See *Maughan* v. *Sharpe*, 10 Jur. N. S. 989.

(*f*) *National Bank of Australasia* v. *United Hand-in-Hand, &c. Co.*, 4 App. Ca. 391. See *Woolf* v. *Vanderzee*, 20 L. T. 353. See also *Jenkins* v. *Jones*, 2 Jur. N. S. 99; *Marriott* v. *Anchor Reversionary Co.*, 3 De G. F. & J. 177; but the two latter decisions appear to have proceeded on a stricter view of the fiduciary character of a mortgagee than would now be recognized.

(*g*) *Tomlin* v. *Luce*, 43 Ch. D. 191, C. A.

(*h*) *Deverges* v. *Sandeman*, (1902) 1 Ch. 579, C. A.

(*i*) *Whitworth* v. *Rhodes*, 20 L. J. Ch. 105; *Cockell* v. *Bacon*, 16 Beav. 158.

(*k*) *Adams* v. *Scott*, 7 W. R. 213.

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which the mortgagee claims to be due to him (*l*); but this rule does not apply where the terms of the deed show that the amount so claimed cannot be due (*m*). Nor does the rule apply where the mortgagee was solicitor to the mortgagor, who acted under his advice; in such a case the Court will look to all the circumstances of the case, and make such order as seems just (*n*).

Injunction after offer to redeem, &c.

An injunction against a sale has been granted after an offer to redeem (*o*); and after an offer to deposit the amount due (*p*); and also where the mortgagee was solicitor to the mortgagor, who had acted under his advice (*q*). But a mere offer unaccompanied by actual tender or payment into court is not sufficient to prevent a sale (*r*), nor will the mere commencement of an action for redemption stop a sale (*s*), nor will an order *nisi* for foreclosure necessarily do so (*t*).

Recovery of moneys improperly demanded.

If the solicitor of a mortgagee refuses to desist from exercising the power of sale, unless the mortgagor pays expenses, with which he is not chargeable, money paid under such compulsion may be recovered back in an action for money had and received (*u*).

Improper conduct of mortgagor.

The Court will not interfere with the exercise by a mortgagee of his power of sale, where the mortgagor has acted improperly, or has acquiesced in the sale (*x*).

Laches.

Nor will a voidable sale be set aside where the mortgagor, having full knowledge of the facts, stands by for ten years without taking any steps to impeach the sale (*y*).

Bankruptcy.

The Court of Bankruptcy has no power to restrain a mortgagee from selling, subject to the rights of creditors, even though the mortgagee obtained his mortgage after the bankruptcy; and, *quære*, whether without such reservation it has power (*z*).

(*l*) *Hill* v. *Kirkwood*, 28 W. R. 385; *Warner* v. *Jacob*, 20 Ch. D. 220, 224. But see *Rhodes* v. *Buckland*, *inf.*

(*m*) *Hickson* v. *Darlow*, 23 Ch. D. 690.

(*n*) *Macleod* v. *Jones*, 24 Ch. D. 289, C. A.

(*o*) *Rhodes* v. *Buckland*, 16 Beav. 212.

(*p*) *Close* v. *Phipps*, 7 Man. & Gr. 586.

(*q*) *Cotterell* v. *Stratton*, L. R. 8 Ch. 295, 304.

(*r*) *Matthie* v. *Edwards*, 16 L. J. Ch. 405; *Warner* v. *Jacob*, 20 Ch. D. 220, 224.

(*s*) *Macleod* v. *Jones*, 24 Ch. D. 289, C. A. See as to sale after tender, *ante*, p. 746.

(*t*) *Stevens* v. *Theatres, Lim.*, (1903) 1 Ch. 857.

(*u*) *Adams* v. *Scott*, 7 W. R. 213.

(*x*) *Ferrand* v. *Clay*, 1 Jur. 265.

(*y*) *Nutt* v. *Easton*, (1899) 1 Ch. 873, affirmed, (1900) 1 Ch. 29.

(*z*) *Re Evelyn, Exp. General Public Works*, (1894) 2 Q. B. 302.

vi.—Who may Purchase.—The mortgagee who sells (except where, in judicial sales, he obtains leave to bid) and his trustee are not allowed to purchase the mortgaged estate (*a*); and a mortgagee, who is also trustee of the estate, will not have leave to bid, if the *cestui que trust* object, until attempts to sell to others have failed (*b*); and even the employment by the purchaser of the clerk of the mortgagee's solicitor as a bidder is sufficient to invalidate the sale, and to burden the estate of the purchaser with the costs of a redemption suit, so far as it was occasioned by the sale (*c*).

Mortgagee cannot purchase.

A collusive sale and reconveyance by the purchaser to the mortgagee will not bind the mortgagor (*d*).

Collusive sale.

A purchase by a mortgagee of property, sold either under the power of sale, or in execution of a decree against a mortgagor company (obtained collusively between the mortgagee and the directors), does not operate to vest an absolute title in the mortgagee (*e*).

A second mortgagee may, in the absence of fraud, buy from the first mortgagee, whether under a power or trust for sale (*f*).

Second mortgagee.

The secretary of a building society who were co-mortgagees cannot purchase (*g*). Nor can a member of the investment committee of a friendly society, being mortgagees and selling under their power of sale, unless he can prove the *bona fides* of the transaction (*h*).

Secretary of mortgagee.

A person who has acted as agent for the mortgagee, in negotiating the advance, surveying the property and receiving the interest for the mortgagee, is not a competent purchaser from the mortgagee under his power of sale (*i*).

Agent of mortgagee.

But the solicitor of the mortgagee may purchase in good faith if he has merely acted for the mortgagee in the mortgage and not in the sale. Such a sale is not void, but possibly void-

Solicitor.

(*a*) *Downes* v. *Grazebrook*, 3 Mer. 200; *Re Bloye's Trusts*, 1 Mac. & G. 488; *Henderson* v. *Astwood*, (1894) A. C. 150, P. C.

(*b*) *Tennant* v. *Trenchard*, L. R. 4 Ch. 537.

(*c*) *Parnell* v. *Tyler*, 2 L. J. Ch. 195; and see *Hodson* v. *Deans*, *inf.*

(*d*) *Robertson* v. *Norris*, 4 Jur. N. S. 443.

(*e*) *National Bank of Australasia* v. *The United, &c. Co.*, 4 App. Ca. 391.

(*f*) *Parkinson* v. *Hanbury*, L. R. 2 H. L. 1. See *Shaw* v. *Bunny*, 2 De G. J. & S. 468; *Kirkwood* v. *Thompson*, 2 De G. J. & S. 613.

(*g*) *Martinson* v. *Clowes*, 21 Ch. D. 857, affirmed on another point, W. N. (1885) 41, C. A.

(*h*) *Hodson* v. *Deans*, (1903) 2 Ch. 647.

(*i*) *Orme* v. *Wright*, 3 Jur. 19.

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able, and might under certain circumstances be impeached by the mortgagee though not by the mortgagor (*k*).

Receiver.

A receiver cannot purchase the property of which he is receiver even when the sale is made by a mortgagee selling with leave outside the action (*l*).

Mortgagee shareholder may sell to company.

There is no valid objection to a *bonâ fide* sale by a mortgagee to a company in which he is a shareholder (*m*).

Abortive purchase by mortgagee does not extinguish power of sale.

An abortive purchase by a mortgagee or a trustee for him does not extinguish the power of sale so as to preclude the mortgagee from subsequently selling under the power and making a good title to the purchaser; but in the interval the mortgagee will be liable to account as the mortgagee in possession (*n*).

Onus.

In all such cases the onus is on the purchaser to prove the fairness of the transaction, and in the absence of such proof the sale will be set aside (*o*).

A tenant for life who purchases the settled property from the mortgagee under a power of sale in the mortgage holds it as trustee for the remaindermen and cannot deal with it as his own (*p*).

Purchase by mortgagor.

But since there is no fiduciary relationship between co-owners, there is nothing to prevent one of several mortgagors from purchasing the property from a mortgagee selling under his power of sale at a price equal to the amount due for principal, interest, and costs, if the sale is a *bonâ fide* exercise of the power (*q*).

A purchase by a mortgagor from a first mortgagee selling under his power operates only as a redemption of the first mortgagee, and will not be allowed to prejudice the second mortgagee, who will be preferred to incumbrancers of the mortgagor after the purchase (*r*). *Secus*, if the purchase is by the mortgagor's trustee in bankruptcy (*s*).

But a mortgagor who, having sold the equity of redemp-

(*k*) *Nutt* v. *Easton*, (1899) 1 Ch. 873; (1900) 1 Ch. 29; and see *Guest* v. *Smythe*, L. R. 5 Ch. 551.

(*l*) *Nugent* v. *Nugent*, (1907) 2 Ch. 292; (1908) 1 Ch. 546.

(*m*) *Farrar* v. *Farrars, Ltd.*, 40 Ch. D. 395, C. A.

(*n*) *Henderson* v. *Astwood*, (1894) A. C. 150, P. C.

(*o*) *Hodson* v. *Deans*, *sup.*

(*p*) *Griffith* v. *Owen*, (1907) 1 Ch. 195.

(*q*) *Kennedy* v. *De Trafford*, (1896) 1 Ch. 762, C. A., affirmed in D. P., (1897) A. C. 180; ct. *Bailey* v. *Barnes*, (1894) 1 Ch. 25.

(*r*) *Otter* v. *Lord Vaux*, 6 De G. M. & G. 638. See 27 Ch. D. at p. 251.

(*s*) *Bell* v. *Sunderland Bldg. Soc.*, 24 Ch. D. 618.

tion, and having become bankrupt, purchased the first mortgage, is a stranger to the estate, and the equities of puisne incumbrancers will not be revived against him by a subsequent re-purchase of the land (*t*).

vii.—The Conveyance—Delivery of Title Deeds.—An express power of sale in a mortgage deed usually empowers the mortgagee, his executors, administrators, or assigns, for the purposes of the sale, to execute and do all such assurances and things as they shall think fit. Formerly, a proviso was added that upon a sale by the executors or administrators of the mortgagee, or by any other person not seised of the legal estate, the heir of the mortgagee should concur in the conveyance; but now such concurrence is unnecessary except in the case of copyholds to which the mortgagee has actually been admitted, as in all other cases the mortgage estate devolves on the personal representatives of the mortgagee (*u*).

Express power to convey.

By Lord Cranworth's Act it was enacted that:—

23 & 24 Vict. c. 145.

Sect. 15. "The person exercising the power of sale hereby conferred shall have power by deed to convey or assign to and vest in the purchaser the property sold, for all the estate and interest therein, which the person who created the charge had power to dispose of; except that in the case of copyhold hereditaments, the beneficial interest only shall be conveyed to and vested in the purchaser by such deed."

Conveyance to the purchaser.

And by sect. 16 of the same Act, it is provided that at any time after the statutory power has become exerciseable, the owner of the charge may demand and recover from the owner of the equity of redemption all title deeds which he would have been entitled to if the property had been then vested in him for all the estate and interest of the person creating the charge; and may also call for the conveyance of the legal estate, if outstanding, to the same extent as the person creating the charge could have called for it.

Owner of charge may call for title deeds and conveyance of legal estate.

By the Conveyancing Act, 1881, it is enacted as follows:—

Conv., &c. Act, 1881, s. 21. Conveyance.

Sect. 21.—"(1.) A mortgagee exercising the power of sale conferred by the Act shall have power, by deed, to convey the property

(*t*) *Re Howard's Estate*, 29 L. R. Ir. 266. See *post*, p. 1467.

(*u*) See *ante*, pp. 866 *et seq.*

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sold, for such estate and interest therein as is the subject of the mortgage (*x*), freed from all estates, interests, and rights to which the mortgage has priority, but subject to all estates, interests, and rights which have priority to the mortgage; except that, in the case of copyhold or customary land, the legal right to admittance shall not pass by a deed under this section, unless the deed is sufficient otherwise by law, or is sufficient by custom, in that behalf."

Title deeds.

"(7.) At any time after the power of sale conferred by the Act has become exerciseable, the person entitled to exercise the same may demand and recover from any person, other than a person having in the mortgaged property an estate, interest, or right, in priority to the mortgage, all the deeds and documents relating to the property, or to the title thereto, which a purchaser under the power of sale would be entitled to demand and recover from him."

Difference between the two Acts as to conveyance.

Inasmuch as the above provisions of the later Act apply only to the exercise of powers of sale given by that Act which are conferred on a mortgagee only where the mortgage deed is executed after the commencement of this Act, it is still necessary to observe the difference in language between the two statutes as regards the amount of the estate and interest which a mortgagee is competent to convey according as he sells under the earlier or later statute.

All estate of mortgagor may be conveyed by Lord Cranworth's Act.

Lord Cranworth's Act empowered a mortgagee exercising his power of sale under that Act to convey to a purchaser the property sold for all the estate and interest which the mortgagor himself could dispose of. It was accordingly held that an equitable mortgagee selling under that Act could convey to a purchaser the legal estate which remained vested in the mortgagor without the concurrence of the latter (*x*). It was also held that a mortgagee by demise of leaseholds, could, under that Act, sell and convey the nominal reversion in the lease vested in the mortgagor (*y*). Hence it seems that a mortgagee of a term may, by this statute, effect a sale of the fee: a right which he can only acquire by consent in a sale in equity, where, if the whole estate be sold, the mortgagor is entitled to the difference in value between the term and the fee (*z*).

Only estate comprised in mortgage can be conveyed by Conv., &c. Act, 1881.

But sect. 21 of the Conveyancing Act empowers a mortgagee exercising his power of sale under that Act to convey the property only "for such estate and interest therein as is the subject

(*x*) *Re Solomon and Meagher's Contract*, 40 Ch. D. 508.

(*y*) *Hiatt* v. *Hilman*, 19 W. R. 694.

(*z*) See *Foster* v. *Eddy*, 18 L. J. Ch. 151; *Cutfield* v. *Richards*, 26 Beav. 241.

of the mortgage." An equitable mortgagee cannot, therefore, under this Act convey the legal estate vested in the mortgagor (*a*). And it is clear that unless a mortgage by demise of leaseholds contains an express declaration of trust of the nominal reversion, or a power of attorney is given to the mortgagee for the purpose, neither a mortgagee selling under this Act nor a purchaser from him can get in the nominal reversion either by compelling the mortgagor to convey it, or by obtaining a vesting order under the Trustee Act, 1893 (*b*).

Outstanding interest.

The purchaser is entitled to a conveyance from the trustee of an outstanding interest, which has been declared to be held in trust for better securing the mortgage debt (*c*).

Effect of conveyance.

The effect of a conveyance by a mortgagee under an express or statutory power of sale, is to vest the property in the purchaser discharged from the mortgage and all claims arising thereunder, and free from all equity of redemption.

If, however, the purchaser agrees with the mortgagor to allow him to redeem, such agreement will be specifically enforced (*d*).

Title deeds.

The effect of sect. 21 (7) of the Act of 1881 is to entitle a subsequent mortgagee, selling under his statutory power, who has paid off, or paid into Court an amount sufficient to meet the first mortgage, if made since 1881 (*e*), to demand and recover from the first mortgagee all title deeds in his possession relating to the property comprised in the subsequent mortgage (*f*).

Where a mortgage comprises land and a policy of life assurance, the mortgagee selling the land under his power is not entitled to retain the mortgage deed under sect. 2 of the Vendor and Purchaser Act, 1874, which only applies to land, but must deliver up the deed to the purchaser (*g*).

Express power to give receipt for purchase-moneys.

viii.—Receipt for the Purchase-money.—According to the usual practice, an express power of sale provides that the receipt of the mortgagee, his executors, administrators, or assigns for the purchase-money, shall effectually discharge the purchaser

(*a*) *Re Hodson and Howes' Contract,* 35 Ch. D. 668, C. A.

(*b*) 56 & 57 Vict. c. 53; *ante,* p. 163. Cf. *London and County Banking Co.* v. *Goddard,* (1897) 1 Ch. 642.

(*c*) *Hampshire* v. *Bradley,* 2 Coll. 34. See *Angier* v. *Stannard,* 3 My. & K. 566.

(*d*) *Orme* v. *Wright,* 3 Jur. 19.

(*e*) See sect. 5 of the Act, set out *ante,* p. 655.

(*f*) See *ante,* p. 836.

(*g*) *Re Williams and Duchess of Newcastle,* (1897) 2 Ch. 144.

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from seeing to the application or being answerable for the loss or misapplication thereof.

23 & 24 Vict. c. 145.

Lord Cranworth's Act, sect. 12, contained a provision to the like effect with regard to sales by mortgagees under that Act.

Conv., &c. Act, 1881, s. 22.

By the Conveyancing Act, 1881, it is enacted:—

Mortgagee's receipts, discharges, &c.

Sect. 22 (1). "The receipt in writing of a mortgagee shall be a sufficient discharge for any money arising under the power of sale conferred by the Act, or for any money or securities comprised in his mortgage, or arising thereunder; and a person paying or transferring the same to the mortgagee shall not be concerned to inquire whether any money remains due under the mortgage."

This enactment practically supersedes the provisions of sect. 23 of Lord St. Leonards' Act (*h*), which is still unrepealed, and which enacts that the *bonâ fide* payment to and receipt of any person to whom any purchase or mortgage money shall be payable upon any express or implied trust, shall effectually discharge the person paying the same from seeing to the application or being answerable for the misapplication thereof, unless the contrary shall be expressly declared by the instrument creating the trust or security. The Act of 1881, like Lord Cranworth's Act (*i*), omits any provision as to a contrary intention.

The receipt of the mortgagee is a complete protection to a *bonâ fide* purchaser without notice, but the section does not preclude a purchaser from making inquiry (*k*). It also protects trustees of a fund which is mortgaged in handing over the fund to the mortgagee on his receipt, but they are not obliged to do so in all cases (*l*).

Express provisions as to application of purchase-moneys.

ix.—**Application of the Purchase-money.**—Express powers of sale in mortgages generally provide that the mortgagee after paying out of the proceeds the expenses of and incident to the sale and retaining thereout the amount of principal, interest, and costs due to him on his mortgage, shall pay the surplus (if any) of the moneys arising from the sale to the mortgagor, his heirs, or his executors, or administrators (according to the nature and tenure of the mortgaged property), or assigns.

(*h*) 22 & 23 Vict. c. 35.
(*i*) 23 & 24 Vict. c. 145.
(*k*) *Ante*, p. 926
(*l*) *Hockey* v. *Western*, (1898) 1 Ch. 350.

It will be seen hereafter (*m*) that if the mortgagee has recourse to the aid of the Court to enforce payment of his debt or realize his security, he will only be allowed to recover six years' arrears of interest, but if the mortgagee himself sells under an express or statutory power, he is entitled to retain out of the purchase-money all unpaid arrears of interest, and this is so, though the purchase-money is in Court, at least where the mortgagor seeks to obtain payment out (*n*).

What arrears of interest are retainable out of proceeds of sale by mortgagee.

The mortgagee exercising his power of sale will also be entitled to retain out of the purchase-money all costs properly incurred of and incident to the sale (*o*), including the costs of an abortive attempt to sell (*p*).

Costs.

Where property is sold by a second mortgagee to third persons subject to the first mortgage, the solicitor acting for the second mortgagee is entitled, in calculating the scale charge, to add the amount of the first mortgage to the amount realized by the equity of redemption (*q*).

Scale fee.

If there is no express trust of the purchase-moneys, the mortgagee will only be constructively a trustee of the surplus if it is ascertained that there is a surplus; and no evidence can be adduced to prove that there is a surplus after six years have elapsed since the sale (*r*).

Effect where no provisions as to surplus moneys.

If the surplus produce of the sale be directed by the mortgage deed to be paid to the executors or administrators of the mortgagor, and the sale is made in his lifetime, it will be personal estate; but if not made till after his death, it will be real estate, and belong to the heir, unless there is a clear intention shown to convert it out and out (*s*); and if the heir or devisee die before the surplus is actually paid to him, it will go as personal estate (*t*).

Whether surplus proceeds of sale devolve as realty or personalty.

Where the ultimate trust in case of realty was for the mort-

(*m*) *Post,* Chap. LIV., Sect. III. (v).

(*n*) *Ibid.*

(*o*) *National Provincial Bank of England* v. *Games,* 31 Ch. D. 582, 593, C. A.

(*p*) *Webster* v. *Patteson,* W. N. (1882) 10. See *Farrer* v. *Lacy, Hartland & Co.,* 31 Ch. D. 42.

(*q*) *Fortescue* v. *Mercantile Bank,* (1897) 2 Q. B. 236, C. A.

(*r*) *Locking* v. *Parker,* L. R. 8 Ch. 30; *Banner* v. *Berridge,* 18 Ch. D. 254. See *Warner* v. *Jacob,* 20 Ch. D. 220.

(*s*) *Wright* v. *Rose,* 2 S. & St. 323; *Van* v. *Barnett,* 19 Ves. 102; *Biggs* v. *Andrews,* 5 Sim. 424; *Bourne* v. *Bourne,* 2 Ha. 35; *Wilmott* v. *Pike,* 5 Ha. 14; *Hardey* v. *Felton,* 14 L. T. O. S. 346; *Re Clarke's Trusts,* 22 L. J. Ch. 230.

(*t*) Dav. Conv. vol. ii. pt. ii. p. 684; *Hardey* v. *Felton,* 14 L. T. O. S. 346; *Re Underwood,* 3 K. & J. 745.

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gagor, his heirs, executors, administrators, or assigns, and the sale took place in the lifetime of the mortgagor, his personal representative was held entitled, though the heir objected on the ground that the mortgagor was a lunatic when he executed the mortgage (*u*).

So the surplus proceeds of a sale in the lifetime of the mortgagor were held to be personal estate notwithstanding that the mortgage deed directed them to be paid to the mortgagor, his "heirs or assigns," and that the mortgagor was a lunatic from before the date of the sale until his death (*x*).

Application of purchase-moneys under Lord Cranworth's Act.

Lord Cranworth's Act, sect. 14, provided that on a sale under that Act, the purchase-money should be applied in the following order:—First, in the payment of the expenses incident to the sale or incurred in any attempted sale; secondly, in discharge of all interest and costs due in respect of the charge; thirdly, in discharge of the principal moneys; and lastly, in payment of the residue to the person entitled to the property subject to the charge.

Conv., &c. Act, 1881, s. 21.

On this point the Conveyancing Act, 1881, enacts as follows:—

Application of purchase-moneys.

Sect. 21 (3). "The money which is received by the mortgagee, arising from the sale, after discharge of prior incumbrances to which the sale is not made subject, if any, or after payment into Court under the Act of a sum to meet any prior incumbrance, shall be held by him in trust to be applied by him, first, in payment of all costs, charges, and expenses, properly incurred by him, as incident to the sale or any attempted sale, or otherwise; and secondly, in discharge of the mortgage money, interest, and costs, and other money, if any, due under the mortgage; and the residue of the money so received shall be paid to the person entitled to the mortgaged property, or authorized to give receipts for the proceeds of the sale thereof."

The effect of the above sub-section as regards a puisne incumbrancer, is to enable him to sell the property comprised in his mortgage free from prior incumbrances by either paying them off out of the purchase-money, or by paying into Court under this Act (*y*) a sufficient sum thereout to meet the principal and any interest due in respect of the prior incumbrances, together

(*u*) *Re Smith's Mortgage*, 7 Jur. N. S. 903.

(*x*) *Re Grange*, (1907) 2 Ch. 20.

(*y*) See sect. 5 of the Act set out *ante*, p. 655.

with such additional amount as the Court may deem sufficient to meet further costs, expenses, or interest.

Mortgagee is trustee of surplus proceeds of sale for mortgagor.

On a sale of the mortgaged property under an express or a statutory power, the mortgagee becomes a trustee of the surplus proceeds for the mortgagor, or for any persons interested therein under any subsequent incumbrance or other dealing with the equity of redemption of which he has notice; and he will accordingly be answerable if he pays the surplus to the wrong person (*z*); but in a doubtful case he can pay the money into Court, or invest it for the benefit of the persons entitled (*a*).

Where a mortgagor devises the equity of redemption and dies insolvent, the mortgagee is a trustee of the surplus for the mortgagor's devisee (*b*).

The last words of the sub-section include a subsequent incumbrancer (*c*), to whom, therefore, a mortgagee may pay any surplus.

So where a first mortgagee upon a sale under his power retained more of the purchase-money than was sufficient to satisfy his claim instead of paying such surplus to a second mortgagee, he was ordered to pay to the latter simple interest thereon, though four years elapsed before the second mortgagee took proceedings to enforce his claim (*d*).

Extent of liability.

The responsibility of a mortgagee as regards surplus proceeds extends to cases where he concurs in the sale of the mortgaged property with notice of a subsequent incumbrance. So where a mortgagor, with the concurrence of the first mortgagees, who had notice of a second mortgage, sold the property and, on completion, the balance, after payment of what was due on the first mortgage, was paid to the mortgagor, it was held that the first mortgagees, having joined in the conveyance with knowledge that part of the purchase-money was about to be applied in disregard of an equity of which they had notice, were liable to make good to the second mortgagee the amount of his security as if they had received the whole of the purchase-money (*e*).

(*z*) *Tanner* v. *Heard*, 23 Beav. 555; *Mathison* v. *Clarke*, 3 Drew. 3; *Magnus* v. *Queensland Bank*, 37 Ch. D. 466; *Re Hall*, (1907) 1 K. B. 875.

(*a*) *Charles* v. *Jones*, 35 Ch. D. 544, 550; *post*, p. 944.

(*b*) *Re Gedney*, (1908) 1 Ch. 804.

(*c*) See sect. 22 (2), *post*, p. 946.

(*d*) *Eley* v. *Read*, 76 L. T. 39, C. A.

(*e*) *West London Commercial Bank* v. *Reliance Permanent Building Society*, 29 Ch. D. 954, C. A.

Settlement of equity of redemption.

Where a voluntary settlement (even before 1893) is made by a mortgagor subsequently to the mortgage, on exercise of the power of sale, the surplus proceeds belong to the persons interested in the settlement and not to the settlor (*f*).

Money raised under Settled Land Acts.

In the case of a mortgage by a tenant for life of settled lands under his statutory powers (*g*), the surplus proceeds will be payable either into Court or to the trustees of the settlement, at the option of the tenant for life, as capital money arising under the settlement pending the application thereof for the purposes for which the money was raised (*h*).

Mortgagee must regard claims *inter se* of parties interested.

The mortgagee, in paying over the surplus, must pay due regard to any just claims which any person interested in the equity of redemption may have against another; and if he should be in doubt on this point, he will be justified in applying to the Court by originating summons as to the validity of the claim. So where a mortgagee sold the mortgaged property which was owned by tenants in common, it was held, on an application by the mortgagee to determine how the balance in his hands should be applied, that the present value of improvements due to expenditure by one tenant in common ought to be allowed in distributing the surplus proceeds of sale (*i*).

Duty of mortgagee where proper person to receive surplus moneys not ascertained.

Where it does not appear who is the proper person to receive the surplus proceeds, the mortgagee may pay the money into Court (*k*). Unless he does so, he is bound to invest the money for the benefit of the persons who may establish their claim to it; and, if he fails to do so, he may be ordered to pay interest at the rate of 4 per cent. per annum as from the date of the sale on the amount in his hands after deducting therefrom what is due to him on his mortgage (*l*).

Notice not to part with surplus moneys.

A mortgagee who has received from persons interested notice not to part with the surplus proceeds of sale pending the determination of dispute as to their respective rights and interests, is not bound to invest the money, and, if it remains unpro-

See *Bentham* v. *Haincourt*, Prec. Ch. 30; *Corbett* v. *National Provident Institution*, 17 T. L. R. 5.

(*f*) *Re Walhampton Estate*, 26 Ch. D. 391.

(*g*) See *ante*, p. 393 *et seq.*

(*h*) 45 & 46 Vict. c. 38, s. 22 (1).

(*i*) *Re Cook's Mortgage, Lawledge* v. *Tyndall*, (1896) 1 Ch. 923.

(*k*) *Roberts* v. *Ball*, 24 L. J. Ch. 471.

(*l*) *Charles* v. *Jones*, 35 Ch. D. 544, 550. See *Quarrell* v. *Beckford*, 1 Madd. 269; *Court* v. *Robarts*, 6 Cl. & F. 65.

ductive in his hands, he will not be chargeable with interest (*m*).

Undue preference by mortgagee.

If a mortgagee shows an intention to give some claimants an undue advantage, the money will be ordered to be paid into Court, and a receiver will be appointed of the proceeds of the property which remains unsold (*n*).

Mortgagee liable only as to equities of which he has notice.

A mortgagee exercising his power of sale will only be answerable as trustee of the surplus proceeds of sale to persons, other than the mortgagor, of whose incumbrances or equities he has notice (*o*).

Mortgagee not trustee where equity of redemption barred.

Where a mortgagee sells under his power after the mortgagor's equity of redemption is barred by lapse of time, he is no longer a trustee of the surplus proceeds of sale, which belong to him absolutely (*p*).

Mortgagee must render accounts of surplus proceeds.

A mortgagee who has sold under his power, being a trustee of the surplus proceeds of sale in his hands, is bound, like any other trustee, to furnish to the person or persons entitled to receive those moneys an account, if demanded, of his claims under his mortgage in respect of principal, interest, and costs, including the expenses of and incident to the sale (*q*).

Right of mortgagee to discharge.

The mortgagee, having rendered such accounts, is not entitled to demand a release under seal (*r*). But he is entitled to have his accounts examined and settled by the puisne incumbrancer or mortgagor claiming to receive the surplus proceeds, and either to have a discharge given to him, or to have the accounts taken by the Court (*s*). Indeed, the claimant can only recover the surplus proceeds, either by claiming the amount admitted by the first mortgagee to be due, which would operate as an estoppel, and so discharge him, or by claiming a different amount, which would necessitate the taking of accounts by the Court, the costs of which would come out of the surplus proceeds (*t*).

(*m*) *Mathison* v. *Clark*, 25 L. J. Ch. 29.

(*n*) *Southwaite* v. *Ripon*, 8 L. J. N. S. Ch. 139. See *Crompton* v. *Burton*, (1895) 2 Ch. 711.

(*o*) *Thorne* v. *Heard and Marsh*, (1895) A. C. 495.

(*p*) *Re Alison, Johnson* v. *Mounsey*, 11 Ch. D. 284; *Re Metropolis, &c. Bldg. Soc.*, (1911) 1 Ch. 698; *ante*, p. 878.

(*q*) See *Springett* v. *Dashwood*, 2 Giff. 521; *Burrows* v. *Walls*, 5 De G. M. & G. 253; *Re Tillott, Lee* v. *Wilson*, (1892) 1 Ch. 86; *Re Page, Jones* v. *Morgan*, (1893) 1 Ch. 304.

(*r*) *King* v. *Mullins*, 1 Drew. 308; *Re Cater*, 25 Beav. 366; *Re Hoskin*, 5 Ch. D. 229.

(*s*) *Chadwick* v. *Heatley*, 2 Coll. 137.

(*t*) See *post*, Chap. LIV., Sect. IV. (ii).

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The Conveyancing Act, 1881, s. 22, further enacts as follows:—

Receipt for moneys received under mortgage otherwise than by sale under power.

"(2.) Money received by a mortgagee under his mortgage or from the proceeds of securities comprised in his mortgage shall be applied in like manner as in the Act directed respecting money received by him arising from a sale under the power of sale conferred by the Act; but with this variation, that the costs, charges, and expenses payable shall include the costs, charges, and expenses properly incurred of recovering and receiving the money, or securities, and of conversion of securities into money, instead of those incident to sale."

This sub-section enables a puisne mortgagee, on a sale by a prior mortgagee under his statutory power, to give to the latter a valid discharge for the surplus to be applied in due course of distribution as if they were proceeds of a sale effected by the puisne mortgagee under his own power (*u*).

(*u*) See *Eley* v. *Read*, *ante*, p. 943.

CHAPTER XLVI.

APPOINTMENT OF A RECEIVER.

SECTION I.

RECEIVER APPOINTED BY THE PARTIES.

Advantage of appointment of a receiver.

i.—Mode of appointing a Receiver independently of Statute. — Where there is reason to anticipate that resort to the income of the mortgaged property may be necessary in order to insure the regular payment of interest, a receiver may be appointed contemporaneously with the completion of the mortgage in order to secure to the mortgagee the advantages without the responsibilities of possession (*a*).

Appointment as part of the mortgage transaction.

The appointment may in such a case be made either by the mortgage deed itself or by a separate instrument. It is, in general, convenient to adopt the latter course in order that the instrument appointing the receiver may be delivered into his custody, to be held and produced by him as his authority if it should become necessary for him to act. If, however, as is not unfrequently the case, the mortgagee's solicitor is appointed receiver, the practice is to make the appointment by the mortgage deed in order to save the expense of a separate instrument (*b*).

Appointment by mortgagor.

Where the appointment is made by the mortgagor, the receiver must be treated as being for all purposes his agent, and all payments made by the receiver, so appointed, to a mortgagee are payments by a mortgagor continuing in possession of the mortgaged estate (*c*). The mortgagee, however, is generally expressed to consent to and approve the appointment (*d*).

(*a*) *See Chambers* v. *Goldwin,* 9 Ves. 254, 271.

(*b*) Dav. Conv., vol. ii. pt. ii. p. 99.

(*c*) Per Rolt, L.J., in *Law* v. *Glenn,* L. R. 2 Ch. 634, at p. 641. See also *Jefferys* v. *Dickson,* L. R. 1 Ch. 183.

(*d*) See *Jones* v. *Smith,* 1 Ha. 43, where the appointment was made jointly by mortgagor and mortgagee.

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Appointment by mortgagee.

A receiver appointed by a mortgagee either under a power in the mortgage deed or under the Conveyancing Act is, in the exercise of his duties, the agent of the mortgagor for all purposes (*e*). So a receiver appointed under a mortgage debenture is the agent of the company (*f*). He is not restricted to matters between the mortgagor and mortgagee, but may affect the mortgagor's relations with third persons (*g*). The power to appoint a receiver conferred by a mortgage deed is not revoked by the death of the mortgagor, and a receiver appointed by a mortgagee under such a power after the death of the mortgagor, becomes the agent of the mortgagor's executor to the extent of his assets (*h*).

But a receiver appointed by debenture holders under a power in the debentures is, in the absence of any provision to the contrary, the agent of the debenture holders and not of the company (*i*).

Form of instrument of appointment.

The instrument appointing a receiver is generally in the form of an ordinary power of attorney, defining the powers and duties of the receiver; and this form is invariably adopted in the case of a receiver of copyholds. Sometimes, however, the lands are demised to the receiver for a term of years, so as to give him the legal estate; but the inconvenience of vesting the legal estate in a person who is intended to be merely a ministerial agent, is such that the practice is not to be recommended.

Mortgagee may appoint receiver at any time.

A mortgagee, although he cannot charge for his trouble in collecting the rents and profits of the mortgaged property, yet may of his own authority, and of his own responsibility, appoint a receiver at any time during the continuance of the security, and, as will be pointed out hereafter (*k*), the mortgagee, in taking the accounts between himself and the mortgagor, will be allowed the remuneration and proper expenses of such receiver.

Possession of such receiver is possession of mortgagee.

A receiver so appointed is, however, the agent of the mortgagee, and, by appointing him, the mortgagee will be deemed to have entered into possession of the mortgaged premises, and will be accountable accordingly (*l*).

(*e*) *Re Hale, inf.*
(*f*) *Bissell* v. *Aerial Motors,* 27 T. L. R. 73.
(*g*) *Re Hale, Lilley* v. *Foad,* (1899) 2 Ch. 107, C. A.
(*h*) *Ibid.*
(*i*) *Re Vimbos, Ltd.,* (1900) 1 Ch. 470; *Deyes* v. *Wood,* (1911) 1 K. B. 806; cf. *Gosling* v. *Gaskell,* (1897) A. C. 575.
(*k*) *Post,* Chap. LIV., Sect. IV. (iii).
(*l*) *Quarrell* v. *Beckford,* 1 Madd. 269; *Davis* v. *Dendy,* 3 Madd. 170;

Where a trust deed to secure debentures empowered the trustees to appoint a receiver and manager of the business, to be the agent of the company, it was held that the trustees were not liable as undisclosed principals for goods supplied to the receiver for the purpose of carrying on the business after the commencement of the winding-up of the company (*m*).

Liability for goods ordered by receiver after winding up.

In a case of a mortgage made before the 1st of January, 1882, the powers conferred by Lord Cranworth's Act (*n*) are exerciseable at the present time (*o*).

Lord Cranworth's Act.

ii. Appointment of a Receiver under the Conveyancing Act, 1881.—This Act (*p*), by sect. 19, confers on mortgagees, where the mortgage is made by deed (among other powers), "a power, when the mortgage money has become due, to appoint a receiver of the income of the mortgaged property, or of any part thereof."

Power to appoint receiver.

And by the same Act it is enacted as follows:—

Sect. 24.—"(1.) A mortgagee entitled to appoint a receiver under the power in that behalf conferred by the Act shall not appoint a receiver until he has become entitled to exercise the power of sale conferred by the Act, but may then, by writing under his hand, appoint such person as he thinks fit to be receiver.

Appointment, powers, remuneration, and duties of receiver.

"(2.) The receiver shall be deemed to be the agent of the mortgagor; and the mortgagor shall be solely responsible for the receiver's acts or defaults, unless the mortgage deed otherwise provides.

"(3.) The receiver shall have power to demand and recover all the income of the property of which he is appointed receiver, by action, distress, or otherwise, in the name either of the mortgagor or of the mortgagee, to the full extent of the estate or interest which the mortgagor could dispose of, and to give effectual receipts, accordingly, for the same.

"(4.) A person paying money to the receiver shall not be concerned to inquire whether any case has happened to authorize the receiver to act.

"(5.) The receiver may be removed, and a new receiver may be appointed, from time to time by the mortgagee by writing under his hand.

"(6.) The receiver shall be entitled to retain out of any money received by him, for his remuneration, and in satisfaction of all

Leith v. *Irvine*, 1 My. & K. 277, at p. 286.

(*m*) *Gosling* v. *Gaskell*, (1897) A. C. 575, approving the judgment of Rigby, L.J., in the Court below, which gives a lucid exposition of the principles governing the responsibility of mortgagees in such cases.

(*n*) 24 & 25 Vict. c. 145.

(*o*) *Re Solomon and Meagher's Contract*, 40 Ch. D. 508.

(*p*) 44 & 45 Vict. c. 41.

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costs, charges, and expenses incurred by him as receiver, a commission at such rate, not exceeding five per centum on the gross amount of all money received, as is specified in his appointment, and if no rate is so specified, then at the rate of five per centum on that gross amount, or at such higher rate as the Court thinks fit to allow, on application made by him for that purpose.

"(7.) The receiver shall, if so directed in writing by the mortgagee, insure and keep insured against loss or damage by fire, out of the money received by him, any building, effects or property comprised in the mortgage, whether affixed to the freehold or not, being of an insurable nature.

"(8.) The receiver shall apply all money received by him as follows (namely):

"(i.) In discharge of all rents, taxes, rates, and outgoings whatever affecting the mortgaged property; and

"(ii.) In keeping down all annual sums or other payments, and the interest on all principal sums, having priority to the mortgage in right whereof he is receiver; and

"(iii.) In payment of his commission, and of the premiums on fire, life, or other insurances, if any, properly payable under the mortgage deed or under the Act, and the cost of executing necessary or proper repairs directed in writing by the mortgagee; and

"(iv.) In payment of the interest accruing due in respect of any principal money due under the mortgage;

and shall pay the residue of the money received by him to the person who, but for the possession of the receiver, would have been entitled to receive the income of the mortgaged property, or who is otherwise entitled to that property."

Repairs.

The receiver can only pay the costs of repairs which are necessary and proper and which are authorised in writing by the mortgagee (*q*).

Arrears of interest.

A receiver appointed by a mortgagee under the Act is bound under sect. 24, sub-sect. 8, to pay arrears of interest due to the mortgagee at the time of the appointment, and not merely interest accruing due after that date (*r*).

Unsecured debt.

Quære whether having regard to the words "affecting the mortgaged property" in sub-sect. 8 the receiver can pay an unsecured debt of the mortgagor (*s*).

Appointment by puisne mortgagee.

A puisne mortgagee may appoint a receiver under the statutory power; but, inasmuch as the power extends only so far as it is in terms conferred by the mortgage deed, a receiver so

(*q*) *White* v. *Metcalf*, (1903) 2 Ch. 567, where the position of a receiver under the Act is considered.

(*r*) *National Bank* v. *Kenney*, (1898) 1 Ir. R. 197.

(*s*) *Re Hale, Lilley* v. *Foad*, (1899) 2 Ch. 107, C. A.

appointed will be liable to be superseded by one subsequently appointed by a prior mortgagee.

Appointment *pendente lite.*

When an action is pending, though the statutory power of appointing a receiver is not determined, the proper course is not to make an appointment under the Act, but to apply to the Court to appoint a receiver (*t*).

Variation of statutory powers.

The statutory power of appointing a receiver, or any of the provisions ancillary thereto, contained in the Act of 1881, may be added to, limited or varied, or altogether negatived by the express terms of the mortgage deed (*u*).

Application of statutory power.

The power applies only to mortgage deeds executed after the commencement of the Act (*x*).

The mere fact of a receiver being appointed by the parties under this Act will not prevent the mortgagee from specially indorsing his writ in an action for recovery of the mortgage debt under Ord. III. r. 6, for the purpose of obtaining summary judgment under Ord. XIV.; but if there is any dispute as to the amount claimed, leave to defend must be granted (*y*).

But in a case where there was a prior action for foreclosure pending, in which accounts had to be taken, and a receiver had been appointed in that action (*z*), it was held that the plaintiff could not, in a subsequent action brought by him for personal payment, specially indorse his writ (*a*).

Powers, duties, and liabilities of receiver appointed by deed.

iii.—Powers, Duties, &c. of Receiver appointed by Deed.—The nature of the office of a receiver appointed by deed, and the extent of his powers, are very different from those of a receiver appointed by the Court (*b*). The one derives his authority wholly from the deed appointing him, and he cannot go beyond the powers thereby given either expressly or by implication of law. The other is an officer of the Court, and acts under its direction; he is accordingly in many respects

(*t*) *Tillett* v. *Nixon*, 25 Ch. D. 238. See *Re Henry Pound, Son, and Hutchins*, 42 Ch. D. 402, 415, C. A.; *British Linen Co.* v. *South American and Mexican Co.*, (1894) 1 Ch. 108.

(*u*) See sect. 19, sub-sects. (2), (3), set out *ante*, p. 909.

(*x*) *Ibid.* sub-sect. (4).

(*y*) *Lynde* v. *Waithman*, (1895) 2 Q. B. 180, C. A. Kay, L.J., intimated (at p. 186) that if the mortgagees had been in possession the case would have been different.

(*z*) The possession of a receiver appointed in an action is that of the Court, not of the mortgagor. See *post*, p. 972.

(*a*) *Earl Poulett* v. *Viscount Hill*, (1893) 1 Ch. 277, C. A. See *Lynde* v. *Waithman*, *sup.*

(*b*) Cf. *Owen & Co.* v. *Cronk*, (1895) 1 Q. B. 265, C. A.; and *Burt* v. *Bull*, (1895) 1 Q. B. 276, C. A.

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guarded and protected by the authority of the Court in the exercise of powers which cannot be conferred by private individuals; it is therefore necessary that, in a receivership deed, the powers, duties, and liabilities of the receiver should be clearly defined.

Notice to quit.

A receiver appointed by the mortgage deed, with power to receive the rents and eject tenants, has been held to be, as agent of the mortgagor, authorized to give notice to quit, within 4 Geo. II. c. 28, s. 1, so as to make the tenants liable in double value for holding over. In the case referred to, the appointment was made, with the consent of the mortgagees, by the mortgagors, who were the beneficial owners, and their trustees joined in conveying the legal estate, but not in the appointment of the receiver (*c*). Where, by a receivership deed, the mortgagor attorned as tenant to the receiver, it was held that the relation of landlord and tenant was created between the receiver and the mortgagor, and that the receiver was entitled to distrain upon the mortgaged premises (*d*).

Power of distress.

A mortgagor in possession has implied authority to realize the rent by distress, and to distrain for it in the mortgagee's name as his bailiff (*e*). A receiver appointed by deed in the usual form, and thereby empowered to receive and recover rents, may, it is conceived, avail himself of such implied authority, though there is no attornment, and distrain in the name of the mortgagee accordingly. But the appointment of a receiver does not of itself give him an implied power of distress (*f*).

Distress by mortgagor.

Where a mortgagee has appointed a receiver under the Conveyancing Act, the Court will restrain the mortgagor from distraining for rent upon a tenant of the mortgaged property (*g*), such distress being illegal (*h*).

Power of sale not affected by appointment.

Where the mortgagee and mortgagor demised to the receiver under the receivership deed, it was held that the power of sale in the mortgage deed was not affected, and that the receiver was bound, without the concurrence of the mortgagor, to join in a

(*c*) *Poole* v. *Warren,* 8 A. & E. 582.

(*d*) *Jolly* v. *Arbuthnot,* 4 De G. & J. 224.

(*e*) *Trent* v. *Hunt,* 9 Exch. 14.

(*f*) *Ward* v. *Shaw,* 9 Bing. 608. As to wrongful distress by receiver of mortgagee, see *Serjeant* v. *Nash,* (1903) 2 K. B. 304.

(*g*) *Bayly* v. *Went,* 51 L. T. 764.

(*h*) *Woolston* v. *Ross,* (1900) 1 Ch. 788.

conveyance to a purchaser from the mortgagee under the power of sale (*i*).

Accounts.

Where a receiver has been appointed by the mortgagor and the first mortgagee, no account will be directed at the suit of a second mortgagee against the receiver in the absence of the first mortgagee (*k*).

Increased rate of interest.

Where by subsequent agreement the rate of interest on the first mortgage was increased, the payments of the extra interest made by a receiver of the mortgage premises were held to bind the second incumbrancer until notice had been given by him to the receiver that his interest was in arrear (*l*).

Remuneration of receiver.

A receiver appointed by a mortgagee under the Conveyancing Act may retain out of any money received by him for his remuneration and expenses, such a commission not exceeding 5 per cent. as is specified in his appointment (*m*).

Payment of taxes, &c.

A receiver, unless authorized by the deed appointing him, is not empowered to pay taxes, rates, and outgoings, nor the expenses of repairs. Such authority is, however, supplied to some extent by Lord Cranworth's Act, and to a greater extent by the Conveyancing Act, 1881, as regards mortgages which come within those respective statutes (*n*).

Exclusion of mortgagee's liability.

Notwithstanding that the receiver is the agent of the mortgagor, it is well to provide expressly that the mortgagee shall not be liable for any loss arising from the acts or defaults of the receiver (*o*).

Liability of receiver.

It is conceived that, even in the absence of stipulation, a receiver will not be liable to the mortgagor for involuntary losses which may occur in the proper discharge of his duty (*p*). Of course, however, he will be liable for losses which may arise by reason of his own misconduct (*q*).

A receiver appointed by deed and not by the Court, with directions to receive rents and profits, is not liable to third parties with whom he deals as such receiver in respect of the moneys received by him without some acknowledgment on his

(*i*) *King* v. *Heenan*, 3 De G. M. & G. 890.
(*k*) *Ford* v. *Rackham*, 17 Beav. 485.
(*l*) *Law* v. *Glenn*, L. R. 2 Ch. 634.
(*m*) 44 & 45 Vict. c. 41, s. 24 (6).
(*n*) See *supra*.
(*o*) *Hutchinson* v. *Lord Massareene*, 2 Br. & B. 49. And see *Jones* v. *Smith*, 1 Ha. 43.
(*p*) *Knight* v. *Lord Plymouth*, 3 Atk. 480.
(*q*) *Wren* v. *Kirton*, 11 Ves. 377; *Salway* v. *Salway*, 2 R. & My. 215.

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part, either express or by implication from his conduct, to render him so liable (*r*).

Section II.

Receiver appointed by the Court.

Legal mortgagee could not formerly obtain appointment of a receiver.

i.—Jurisdiction to appoint a Receiver.—In reference to the appointment of a receiver by the Court, on application by the mortgagee, the rule before the Judicature Acts was that if the mortgagee, having the legal estate, neglected to take the precaution of an agreement with the mortgagor for the appointment of a receiver, he could not, as a general rule, obtain such appointment by order of the Court, but must have proceeded to eject the mortgagor (*s*).

Power of Court under Judicature Acts.

By the Judicature Act, 1873 (*t*), a receiver may be appointed by an interlocutory order of the Court in all cases in which it shall appear to the Court to be just or convenient that such order should be made, and any such order may be made either unconditionally or upon such terms and conditions as the Court shall think just. Under this section there is no limit to the power of the Court to appoint a receiver on motion, except that it is only to be exercised when it appears "just or convenient" (*u*), which means "where it is practicable and the interests of justice require it" (*x*), but the principles on which the jurisdiction rested have not been changed (*y*), and the circumstances must be such as would have enabled the Court to make the order before the Act (*z*). On the other hand, it has been said that the Act does not merely continue the old powers and practice, but confers new statutory powers (*a*).

It is desirable when an action is pending that a receiver should be appointed by the Court rather than by the mortgagee (*b*).

(*r*) *Owen & Co.* v. *Cronk,* (1895) 1 Q. B. 265. See *Bartlett* v. *Dimond,* 14 M. & W. 49; *Pardoe* v. *Price,* 16 M. & W. 451; *Gosling* v. *Gaskell,* (1897) A. C. 575.

(*s*) *Berney* v. *Sewell,* 1 J. & W. 647; *Sturch* v. *Young,* 5 Beav. 557.

(*t*) 36 & 37 Vict. c. 66, s. 25 (8).

(*u*) Per Jessel, M.R., *Gawthorpe* v. *Gawthorpe,* W. N. (1878) 91.

(*x*) *Edwards & Co.* v. *Picard,* (1909) 2 K. B. 903, per F. Moulton, L.J.

(*y*) *Holmes* v. *Millage,* (1893) 1 Q. B. 551.

(*z*) *Harris* v. *Beauchamp,* (1894) 1 Q. B. 801, C. A.

(*a*) *Edwards & Co.* v. *Picard, sup.,* per F. Moulton, L.J.

(*b*) *Tillett* v. *Nixon, inf.*

The appointment of a receiver has been extended under this section to the whole property comprised in a security, as to part of which the incumbrancer was a legal, and as to part equitable, mortgagee (*c*).

Meaning of "interlocutory order."

The expression "interlocutory order" in this enactment means any order other than an order made by way of final judgment at the hearing of the cause, whether such order be made before judgment or after (*d*).

Appointment at trial.

The Court has jurisdiction to make an order appointing a receiver at the trial of the action as well as upon an interlocutory application (*e*).

Form of application.

The application for the appointment of a receiver in the Chancery Division is made by motion, and except by consent a receiver is not appointed on summons. The case of an originating summons for foreclosure is an exception to this rule; for in such cases receivers are constantly appointed in chambers. In cases arising within the Railway Companies Act, 1867 (*f*), a receiver may be appointed on petition.

No appointment unless action pending.

The Court has no jurisdiction to appoint a receiver unless an action is pending (*g*); but, for this purpose, an originating summons is an action (*h*). This rule applies even in the case of infant mortgagors (*i*); but a receiver may be appointed over the property of a lunatic on petition though no action is pending (*k*).

Originating summons.

A receiver may be appointed in proceedings for foreclosure commenced by originating summons, under Ord. LV. r. 5A, at any time after service of the summons (*l*); and, in an urgent case, leave may be given to serve notice of motion to appoint a receiver together with the summons (*m*); leave for this purpose may be given *ex parte* subject to any objections (*n*). Costs of an action commenced by writ will not, therefore, be allowed merely on the ground that an order for the appointment of a receiver is asked for (*o*).

(*c*) *Pease* v. *Fletcher*, 1 Ch. D. 273; *Tillett* v. *Nixon*, 25 Ch. D. 239.

(*d*) *Smith* v. *Cowell*, 6 Q. B. D. 75, C. A.

(*e*) *Re Prytherch, Prytherch* v. *Williams*, 42 Ch. D. 590, 600.

(*f*) 30 & 31 Vict. c. 127. See *post*, p. 963.

(*g*) *Exp. Mountfort*, 15 Ves. 445.

(*h*) *Re Fawsitt, Galland* v. *Burton*, 30 Ch. D. 231, C. A.

(*i*) *Exp. Mountfort*, 15 Ves. 445.

(*k*) *Exp. Whitfield*, 2 Atk. 315.

(*l*) *Re Francke, Drake* v. *Francke*, 57 L. J. Ch. 437. See *Gee* v. *Bell*, 35 Ch. D. 160.

(*m*) *Smeed* v. *Cumberland*, 31 S. J. 659; *Robson* v. *Horner*, W. N. (1893) 100.

(*n*) *Robson* v. *Horner*, W. N. (1893) 100.

(*o*) *Barr* v. *Harding*, 36 W. R. 216; *O'Kelly* v. *Culverhouse*, W. N.

Service.

If the mortgagor was out of the jurisdiction, the Court would formerly have dispensed with service of notice to appoint a receiver (*p*); but this it seems would not be done under the present practice. Where a defendant has not appeared the summons cannot be served by filing it with the proper officer, it must be served personally or leave for substituted service obtained (*q*).

Indorsement of writ or summons.

Where the appointment of a receiver is the substantial object of an action, the writ should be indorsed with a claim for such appointment (*r*). And, apparently, a similar rule would apply in the case of an originating summons. But the writ may be amended by the insertion of a claim for a receiver (*r*); and a creditor who has obtained judgment may obtain the appointment of a receiver, though the writ did not originally claim a receiver and has not been amended (*s*).

Time for moving.

The holder of a debenture secured by a floating charge can apply for a receiver as soon as the money has become payable, although at the date of the issue of the writ there was no default or jeopardy (*t*).

Action for account.

The mortgagee of a share may have a receiver appointed over the whole property (*u*), so the mortgagee of the share of one tenant in common of a mine or colliery may, in a suit for an account against the mortgagor and co-tenants in common, apply for the appointment of a receiver, without praying a dissolution of the concern (*x*).

Mode of application by plaintiff.

If the application for a receiver be made by a plaintiff, it may be made either *ex parte* or with notice (*y*). An application *ex parte*, made without notice to the person whose property is sought to be affected, ought not to be granted even after judgment, except in cases of emergency (*z*), and is only justified where there is evidence of immediate danger to the property which is the subject of the security, or of other cir-

(1887) 36; *Re Francke, Drake* v. *Francke, sup.*

(*p*) *Tanfield* v. *Irvine*, 2 Russ. 149.

(*q*) *Tilling* v. *Blythe*, (1899) 1 Q. B. 557, C. A.

(*r*) *Colebourne* v. *Colebourne*, 1 Ch. D. 690, C. A.

(*s*) *Norton* v. *Gover*, W. N. (1877) 206; *Salt* v. *Cooper*, 16 Ch. D. 544, C. A.

(*t*) *Graham* v. *Carshalton Park Estate*, (1908) 2 Ch. 62.

(*u*) *Sumsion* v. *Cruttwell*, 31 W. R. 399. And see (1891) 2 Ch. 148.

(*x*) *Bentley* v. *Bates*, 4 Y. & C. Ex. 182.

(*y*) R. S. C. Ord. L. r. 6.

(*z*) *Lucas* v. *Harris*, 18 Q. B. D. 127, at p. 134, C. A. See *Caillard* v. *Caillard*, 25 Beav. 512.

cumstances of an urgent nature (*a*). Under very special circumstances, a receiver may be appointed *ex parte* before service of the writ (*b*).

Leave to serve notice of motion.

Where it is desired to serve the defendant with notice of motion for a receiver before appearance, special leave of the Court must be obtained (*c*), and leave to give short notice of motion must be expressly given for that purpose (*d*). The fact of leave having been given must be mentioned in the notice of motion, which must be served on the defendant personally (*e*), unless he has absconded (*f*).

The order appointing the receiver will be made upon affidavit of service of the notice of motion (*g*).

Application by defendant for appointment of receiver.

A defendant may now, by Ord. L. r. 6, at any time after he has entered an appearance, and either before or after judgment, apply for the appointment of a receiver, but such an application must be made upon due notice to the plaintiff (*h*), unless in case of urgency (*i*).

To whom application may be made

The Court of Appeal can appoint a receiver, though no order for such appointment has been made in the Court below (*k*).

When made in Chambers.

If the application is made in an action commenced by writ, and is an original application, it must be made in open Court unless the appointment is by consent (*l*); but an application for the appointment of a receiver in place of one already appointed may be made in Chambers (*m*). In the case of an originating summons, a receiver may be appointed either in Chambers or in Court immediately or at any time after the service of the summons (*n*).

No appointment after foreclosure absolute.

An order for the appointment of a receiver cannot be obtained after a decree for foreclosure absolute, the action being then at an end; unless the Court should, for sufficient reasons, think proper to open the foreclosure (*o*).

(*a*) *Taylor* v. *Eckersley*, 2 Ch. D. 302; *Hyde* v. *Warden*, 1 Ex. D. 309; *Cash* v. *Parker*, 12 Ch. D. 294; *Fuggle* v. *Bland*, 11 Q. B. D. 711.

(*b*) *H*—— v. *H*——, 1 Ch. D. 276.

(*c*) *Ramsbottom* v. *Freeman*, 4 Beav. 145.

(*d*) *Hart* v. *Tulk*, 6 Ha. 611.

(*e*) *Hill* v. *Rimmell*, 8 Sim. 632; *Meaden* v. *Sealey*, 6 Ha. 620; *Jacklin* v. *Wilkins*, 6 Beav. 608.

(*f*) *Dowling* v. *Hudson*, 14 Beav. 423; *London and South Western Bank* v. *Facey*, 19 W. R. 676.

(*g*) *Meaden* v. *Sealey*, 6 Ha. 620.

(*h*) *Sargent* v. *Read*, 1 Ch. D. 600.

(*i*) *Hick* v. *Lockwood*, W. N. (1883) 48.

(*k*) *Hyde* v. *Warden*, 1 Ex. D. 309, C. A.

(*l*) *Blackborough* v. *Ravenhill*, 16 Jur. 1085.

(*m*) *Grote* v. *Bing*, 20 L. T. 124; *Booth* v. *Coulton*, 16 W. R. 683.

(*n*) *Re Francke, Drake* v. *Francke*, 57 L. J. Ch. 437.

(*o*) *Wills* v. *Luff*, 38 Ch. D. 197.

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Appointment is in discretion of Court.

ii.—**In what Cases, and at whose instance, a Receiver will be appointed.**—The appointment of a receiver is a matter entirely within the discretion of the Court, in the exercise of which it will be guided by a consideration of the circumstances of the particular case (*p*). In the case of an application by a mortgagee for that purpose, there are obvious conveniences in appointing a receiver so as to prevent a mortgagee from being in the onerous position of a mortgagee in possession (*q*).

The appointment of a receiver will, as a general rule, be made as a matter of course on the application of a mortgagee, whether legal or equitable, if the interest payable under the security is in arrear (*r*), even though the mortgagee is not entitled to enforce his security by foreclosure or sale, by reason of a covenant on his part that the principal shall not be called in for a specified period (*s*); or if the property comprised in the mortgage would be in danger if left until the hearing in the possession of the mortgagor (*t*). So, a receiver may be granted to an equitable mortgagee by deposit of deeds (*u*). Where a debtor has agreed to give a mortgage, and has not performed the agreement, and the interest is in arrear, a receiver will be appointed before defence, though no waste or other detriment to the property is shown (*x*).

A receiver may be appointed though the applicant's title is in dispute (*y*), even in an ejectment action (*z*), but he must show a *primâ facie* title, legal or equitable (*a*). The Court will not, upon an application for a receiver, decide or prejudice the cause (*b*), or say what view will be taken at the hearing (*c*).

(*p*) *Greville* v. *Fleming*, 2 J. & L. 339; *Re Henry Pound, Son, and Hutchins*, 42 Ch. D. 402, at p. 419.

(*q*) Per Cotton, L.J., in *Re Pope*, 17 Q. B. D. 743, at p. 749. See *Re Prytherch, Prytherch* v. *Williams*, 42 Ch. D. 590.

(*r*) *Shakel* v. *Duke of Marlborough*, 4 Madd. 463. And see *Duckworth* v. *Trafford*, 18 Ves. 283; *Free* v. *Hinde*, 2 Sim. 7; *Wilson* v. *Wilson*, 2 Keen, 249; *Hopkins* v. *Worcester and Birmingham Canal Co.*, L. R. 6 Eq. 447.

(*s*) *Burrowes* v. *Molloy*, 2 J. & L. 521.

(*t*) *Evans* v. *Coventry*, 5 De G. M. & G. 917. See *Whitworth* v. *Whyddon*, 2 Mac. & G. 55; *Herbert* v. *Greene*, 3 Ir. Ch. R. 270, 273.

(*u*) *Bodger* v. *Bodger*, 11 W. R. 160.

(*x*) *Aberdeen* v. *Chitty*, 3 Y. & C. Ex. 379.

(*y*) *Berry* v. *Keen*, 51 L. J. Ch. 912. See *Bodger* v. *Bodger*, *sup.*

(*z*) *John* v. *John*, (1898) 2 Ch. 573, C. A.

(*a*) *Cupit* v. *Jackson*, 13 Pri. 721, 734; *White* v. *Smale*, 22 Beav. 73; *White* v. *James*, 26 Beav. 191.

(*b*) *Huguenin* v. *Baseley*, 13 Ves. 107.

(*c*) *Fripp* v. *Chard Rail. Co.*, 11 Hare, 264. See also *Skinners' Co.* v. *Irish Soc.*, 1 My. & Cr. 164; *Greville* v. *Fleming*, 2 J. & L. 335.

A receiver will not be granted where the amount of the property is so small that there is nothing likely to be recovered (*d*).

Where a mortgagee has, under or by virtue of his security, power to appoint a receiver, and has exercised such power, the proper course appears to be to apply to the Court, not to appoint a receiver, but for an order giving liberty for the receiver already appointed to exercise such powers as are desired, and which could only be exercised under the discretion of the Court (*e*).

Appointment after mortgagee has taken possession.

Formerly, a mortgagee who had taken possession could not have a receiver appointed by the Court (*f*). But a legal mortgagee may now, even though he has taken possession, apply to have a receiver appointed. And if the circumstances are such as to render it just and convenient that a receiver should be appointed, the application will be granted (*g*); but it is entirely in the discretion of the Court to grant or refuse the application. A legal mortgagee who has once taken possession of mortgaged property cannot relinquish it at his pleasure, and, as a general rule, the Court will not assist him to do so by appointing a receiver (*h*), unless it is to the advantage of all parties (*i*).

Mortgagee prevented from taking possession.

A receiver was appointed on the interlocutory application of a legal mortgagee, where the mortgagor prevented him from taking possession of the premises (*k*).

Appointment on application of puisne mortgagee where first mortgagee is in possession.

If the first mortgagee be in possession, the Court will not, in general, on the application of a subsequent mortgagee, or other creditor, appoint a receiver, but the second mortgagee must redeem the first, according to his own statement of the amount due on his security (*l*). Even if the first mortgagee is unable to state with precision what is due to him, but can state upon oath that something is due to him on the security, the Court will not go into evidence to contradict the statement, and will refuse to appoint a receiver against him (*m*). But the Court will, in such a case, oblige the first mortgagee, on payment

(*d*) *I*——— v. *K*———, W. N. (1884) 63.

(*e*) *Re Henry Pound, Son, and Hutchins*, 42 Ch. D. 402.

(*f*) *Sturch* v. *Young*, 5 Beav. 557.

(*g*) *Tillett* v. *Nixon*, 25 Ch. D. 238; *Mason* v. *Westoby*, 32 Ch. D. 206; *County of Gloucester Bank* v. *Rudry Merthyr, &c. Colliery Co.*, (1895) 1 Ch. 629, C. A.

(*h*) *Re Prytherch, Prytherch* v. *Williams*, 42 Ch. D. 590.

(*i*) See (1895) 1 Ch. at p. 635.

(*k*) *Truman* v. *Redgrave*, 18 Ch. D. 547.

(*l*) *Berney* v. *Sewell*, 1 J. & W. 647; *Caldwell* v. *Ellison*, 9 L. T. N. S. 751.

(*m*) *Quarrell* v. *Beckford*, 13 Ves. 378; *Rowe* v. *Wood*, 2 J. & W. 558.

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being made to him of the amount which he swears to be due, to give security to refund, if it should appear upon account that he has received too much (*n*).

If, however, the first mortgagee cannot positively assert on oath that something, however small, is due to him, the Court will appoint a receiver (*o*), and such assertion must be clear and unequivocal (*p*). If the accounts are in so confused a state as to prevent the first mortgagee from asserting positively that something is due, the Court will assume that nothing is due, and will appoint a receiver (*q*). But time may be given to him to examine the accounts and make an affidavit of the debt (*r*).

When receiver will be appointed in such cases.

So, a receiver will be appointed if the party applying offer to pay off the first mortgagee according to his own demand, and the latter refuse to accept what is due to him, or will not swear that anything is due (*s*).

If a charge of mismanagement is sufficient ground to take the possession from the first mortgagee, the charge must be of a clear and specified nature (*t*). The puisne mortgagee, however, though not entitled to a receiver, may obtain, if a *primâ facie* case of mismanagement is made out, an order directing regular accounts to be kept, and for inspection of books, &c. (*u*).

When first mortgagee is not in possession.

But if the first mortgagee be not in possession, a second mortgagee may have a receiver, without prejudice to the rights of the first (*x*). The order for receiver runs "without prejudice to the rights of any prior incumbrancers" (*y*). The Court will not allow a first mortgagee to object to the appointment of a receiver at the instance of a puisne incumbrancer, unless the first mortgagee will exercise his legal right of entry and take possession of the property (*z*).

Where mortgagees of the whole of a property declined to enter into possession, the Court, at the instance of puisne mort-

(*n*) Dan. Ch. P. (7th ed.) 1413, 1667. See *Berney* v. *Sewell*, 1 J. & W. at p. 649.

(*o*) *Quarrell* v. *Beckford*, *sup.*; *Rowe* v. *Wood*, *sup.*

(*p*) *Hiles* v. *Moore*, 15 Beav. 175.

(*q*) *Codrington* v. *Parker*, 16 Ves. 469; *Hiles* v. *Moore*, *sup.*

(*r*) *Codrington* v. *Parker*, *sup.*

(*s*) *Berney* v. *Sewell*, 1 J. & W. 647.

(*t*) *Rowe* v. *Wood*, 2 J. & W. 553. See *Barkley* v. *Lord Reay*, 2 Ha. 306 (charge of mismanagement against trustees in possession).

(*u*) *Rowe* v. *Wood*, *sup.*

(*x*) *Berney* v. *Sewell*, 1 J. & W. 647; *Bryan* v. *Cormick*, 1 Cox, 422; *Dalmer* v. *Dashwood*, 2 Cox, 378. And see *Phipps* v. *Bishop of Bath and Wells*, 2 Dick. 608; *Price* v. *Williams*, G. Coop. 31; *Archdeacon* v. *Bowes*, 3 Anst. 752.

(*y*) See *Underhay* v. *Read*, 20 Q. B. D. 209.

(*z*) *Silver* v. *Bishop of Norwich*, 3 Swanst. 114, n.

gagees of an undivided fifth share, in an action for partition or sale, appointed a receiver of the rents of the whole property (*a*).

The Court may appoint a receiver, although the mortgagee has himself power to appoint a receiver (*b*), and even though a receiver has been already appointed, if the power has been improperly exercised (*c*).

iii.—Over what Property a Receiver may be appointed.— Form of order.

The order appointing a receiver should distinctly state over what property the receiver is appointed (*d*).

A receiver may be appointed of the rents and profits of real estate, and of all personal estate of which creditors may have execution at law by writs of *fi. fa.* or *elegit* (*e*); also of all property which is regarded as assets in equity (*f*); but not of any other property, unless it is assignable and actually assigned or charged by the mortgage deed.

The Court has appointed receivers of a manor, to hold courts, &c. (*g*); of collieries and other mines (*h*); tithes (*i*); of a rent-charge (*k*); of turnpike and other tolls (*l*); of an equity of redemption (*m*); of an equitable interest in land where the legal estate is vested in trustees (*n*); of a fund standing to the credit of a debtor in another Court (*o*); of a reversionary interest in personalty (*p*); of a newspaper (*q*); of an hotel (*r*); of the licence of licensed premises (*s*); but a receiver cannot

(*a*) *Sumsion* v. *Cruttwell*, 31 W. R. 399.

(*b*) *Tillett* v. *Nixon*, 25 Ch. D. 238; *Bord* v. *Tollemache*, 1 N. R. 177.

(*c*) *Re Maskelyne British Typewriter*, (1898) 1 Ch. 133, C. A.

(*d*) *Crowe* v. *Wood*, 13 Beav. 271.

(*e*) *Davis* v. *Duke of Marlborough*, 1 Swanst. 74, at p. 83.

(*f*) *Blanchard* v. *Cawthorne*, 4 Sim. 572; *Gore* v. *Bowser*, 3 Sm. & G. 8.

(*g*) *Thellusson* v. *Woodford*, 13 Ves. 209; 4 Madd. 420. See *Windham* v. *Giubilei*, W. N. (1871) 119.

(*h*) *Jefferys* v. *Smith*, 1 J. & W. 298; *Clegg* v. *Fishwick*, 1 Mac. & G. 294; *Peek* v. *Trinsmaran Colliery Co.*, 2 Ch. D. 116; *Campbell* v. *Lloyd's Bank*, 58 L. J. Ch. 424; *County of Gloucester Bank* v. *Rudry*, (1895) 1 Ch. 629.

(*i*) *Lymberry* v. *Helsham*, 1 Ir. Ch. R. 633.

(*k*) *Wise* v. *Beresford*, 3 D. & War. 276; *Cullen* v. *Dean, &c. of Killaloe*, 2 Ir. Ch. R. 133.

(*l*) *Lord Crewe* v. *Edleston*, 1 De G. & J. 93.

(*m*) *Anglo-Italian Bank* v. *Davies*, 9 Ch. D. 275, C. A.; *Smith* v. *Cowell*, 6 Q. B. D. 75, C. A.; *Exp. Evans*, 13 Ch. D. 253. See *ante*, p. 672.

(*n*) *Wells* v. *Kilpin*, L. R. 18 Eq. 298.

(*o*) *Westhead* v. *Reilly*, 25 Ch. D. 413.

(*p*) *Fuggle* v. *Bland*, 11 Q. B. D. 711; *Tyrrell* v. *Painton*, (1895) 1 Q. B. 202; *Ideal Bedding Co.* v. *Holland*, (1907) 2 Ch. 157.

(*q*) *Chaplin* v. *Young*, 6 L. T. 97; *Kelly* v. *Hutton*, 17 W. R. 425.

(*r*) *Truman* v. *Redgrave*, 18 Ch. D. 547.

(*s*) *Leney* v. *Callingham*, (1908) 1 K. B. 79.

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be appointed of the future earnings of a business unless they have been assigned or charged (*t*). And in a proper case a manager of a mortgaged business or undertaking may be appointed (*u*). So also a receiver, with power to manage, may be appointed of a ship under a registered statutory mortgage (*x*).

Property of married woman.

A receiver may be appointed of the separate estate of a married woman, provided she is not restrained from anticipation (*y*). But where a married woman purports to mortgage property which is subject to such restraint, a protection order subsequently obtained by her will not apply to such property, so as to entitle the mortgagee to apply for the appointment of a receiver thereof (*z*).

A party obtaining an order for payment of costs out of the separate estate of a married woman is *primâ facie* entitled to a receiver of her property subject to restraint, and the onus is on her to show why the appointment should not be made (*a*).

Income vested in trustees.

So also a receiver may be appointed of the income of a fund which is vested in trustees (*b*); but not when the payment of such income to the debtor is wholly dependent on the discretion of the trustees (*c*).

A receiver was appointed of a mortgage, part of a testator's estate, against a trustee and executor of the will, who by refusing to act had rendered a suit necessary, on the application of the person beneficially interested in the mortgage moneys (*d*).

Profits of benefice.

A receiver cannot be appointed of the profits of an ecclesiastical benefice, as a charge on such profits is prohibited by statute (*e*).

Pay and salary of officer.

A receiver cannot be appointed of the pay or half pay of a

(*t*) *Cadogan* v. *Lyric Theatre*, (1894) 3 Ch. 338, C. A.; *Re Johnson*, (1898) 2 Ir. R. 551.

(*u*) See *infra*, p. 967.

(*x*) *Fairfield Shipbuilding, &c. Co.* v. *London and East Coast Express Steamship Co.*, W. N. (1895) 64.

(*y*) *Bryant* v. *Bull*, 10 Ch. D. 153; *Re Peace and Waller*, 24 Ch. D. 405, C. A.; *Cummins* v. *Perkins*, (1899) 1 Ch. 16. See *Hood-Barrs* v. *Cathcart* (No. 1), (1894) 2 Q. B. 559, C. A.; *Hood-Barrs* v. *Heriot*, (1896) A. C. 174.

(*z*) *Hill* v. *Cooper*, (1893) 2 Q. B. 85, C. A.

(*a*) *Pawley* v. *Pawley*, (1905) 1 Ch. 593.

(*b*) *Oliver* v. *Lowther*, 28 W. R. 381; *Webb* v. *Stenton*, 11 Q. B. D. 518, 530, C. A.

(*c*) *Jenner-Fust* v. *Needham*, 32 Ch. D. 582, C. A.

(*d*) *Palmer* v. *Wright*, 10 Beav. 234.

(*e*) 13 Eliz. c. 20; 57 Geo. III. c. 99. See *ante*, p. 447.

military or naval officer (*f*), or of the salary of any office which cannot be lawfully assigned (*g*).

Pension.

A receiver may be appointed of any pension which is legally assignable (*h*); but not of a pension the assignment of which is prohibited by statute (*i*), or by public policy, by reason of such pension being granted partly in consideration of future service (*k*). *Secus*, as to money awarded in commutation of a pension (*l*).

The assignability of pay, salaries and pensions, has been discussed in a former chapter (*m*).

A receiver will, it seems, be appointed of the profits of an office granted by letters patent (*n*); so also the salary of the chaplain to a workhouse (*o*), or a fellowship (*p*).

Future earnings.

A receiver may apparently be appointed of future earnings of any kind, if such earnings are assignable and have been included in a mortgage; but unless a man has assigned or charged his future earnings, they cannot be prospectively impounded by his creditors by any ordinary process of execution, legal or equitable (*q*).

A receiver will not be appointed at the suit of specialty creditors of the testator against the mortgagee of the devisee of the tenant for life of an equitable interest (*r*).

Railway Companies Act, 1867.

A mortgagee of a railway company who has recovered judgment against the company may avail himself of the provisions of the Railway Companies Act, 1867 (*s*).

Receiver and manager of undertaking.

By sect. 4 of that Act, the rolling stock and plant of a railway company are protected from being taken in execution; but a receiver, and, if necessary, a manager, of the undertaking, may be appointed, on the petition of a judgment creditor; and the moneys paid to such receiver or manager, after providing

(*f*) *Apthorpe* v. *Apthorpe*, 57 L. T. 518.

(*g*) *Cooper* v. *Reilly*, 1 R. & My. 560. See *Palmer* v. *Bate*, 6 Moo. 28; *Exp. Huggins*, 21 Ch. D. 85; *Re Mirams*, (1891) 1 Q. B. 594.

(*h*) *Re Mirams*, *sup.*; *Manning* v. *Mullins* (1898), 2 Ir. R. 34.

(*i*) *Birch* v. *Birch*, 8 P. D. 163; *Lucas* v. *Harris*, 18 Q. B. D. 127; *Brenan* v. *Morrisey*, 26 L. R. Ir. 618.

(*k*) *Davis* v. *Duke of Marlborough*, 1 Swanst. 74; *Wells* v. *Foster*, 8 M. & W. 152.

(*l*) *Crowe* v. *Price*, 22 Q. B. D. 429.

(*m*) Chap. XVIII.

(*n*) *Blanchard* v. *Cawthorne*, 4 Sim. 566.

(*o*) *Reg.* v. *Judge of Lincolnshire County Court*, 20 Q. B. D. 167.

(*p*) *Feistel* v. *King's Coll.*, 10 Beav. 491, 509.

(*q*) *Holmes* v. *Millage*, (1893) 1 Q. B. 551, C. A. But see *Cadogan* v. *Lyric Theatre*, (1894) 3 Ch. 338.

(*r*) *Coope* v. *Cresswell*, 12 W. R. 299.

(*s*) 30 & 31 Vict. c. 127, made perpetual by 38 & 39 Vict. c. 31.

for the working expenses of the railway and other outgoings, will be applied and distributed under the direction of the Court.

What companies are within the Act.

The Act applies only to the undertakings of railway companies, and does not give the Court jurisdiction to appoint a manager of waterworks, tramways, or other undertakings of a public nature (*t*); but the statutory protection and power extend to the rolling stock and plant of a company constituted by statute for the purpose of constructing and working a railway, even though the railway is merely a subordinate and ancillary part of the undertaking authorized by the statute (*u*).

Appointment is of right.

The appointment of a receiver, and, if necessary, a manager, on the application of a judgment creditor, is, under this section, a matter of right; and the only evidence required is, that he is such a creditor, and that his judgment is unsatisfied, and that the company is a going concern (*x*).

Several judgment creditors.

But where an order appointing a receiver and manager has been made on the application of one judgment creditor, and is in force, another judgment creditor cannot obtain a similar order (*y*).

Grounds for appointing a manager.

In determining whether it is necessary to appoint a manager, the Court will take into consideration the position of the company, and will act as it deems best in the interest of all the creditors, having regard to the interests of the public (*z*).

Who will be appointed manager.

As a general rule, with a view to the public convenience, if a manager of a railway undertaking is appointed, the directors of the company, or some of them, or the secretary, will be appointed managers or manager (*a*).

Jurisdiction depends solely on the Act.

Prior to the Act above referred to, the Court had no jurisdiction to appoint a manager of a railway, nor is there any such jurisdiction independently of the Act; and accordingly the appointment of a manager cannot be made upon the application of debenture holders in the case of a railway or other public company incorporated by a special Act (*b*). And, in-

(*t*) *Blaker* v. *Herts Waterworks Co.*, 41 Ch. D. 399; *Marshall* v. *South Staffordshire Tramways Co.*, (1895) 2 Ch. 36.

(*u*) *Great Northern Rail. Co.* v. *Tahourdin*, 13 Q. B. D. 320, C. A.

(*x*) *Re Manchester and Milford Rail. Co.*, 14 Ch. D. 645, C. A.

(*y*) *Re Mersey Rail. Co.*, 37 Ch. D. 610, C. A.

(*z*) *Re Hull, Barnsley, &c. Rail. Co.*, 57 L. T. 82. See *Deacon* v. *Arden*, 50 L. T. 584; and *Davies* v. *Vale of Evesham Preserves*, 73 L. T. 150.

(*a*) *Re Manchester and Milford Rail. Co.*, 14 Ch. D. 645, C. A.

(*b*) *Gardner* v. *London, Chatham & Dover Rail. Co.*, L. R. 2 Ch. 201; *Blaker* v. *Herts, &c. Waterworks*

deed, upon the principle that the Court will in no case (except in cases coming under the Railway Companies Act, 1867) assume the permanent management of an undertaking of a public nature, the Court will not generally, at the instance of debenture holders, appoint a manager of such an undertaking, though carried on by a company formed under the Companies Act (*c*).

Appointment of receivers of railways, &c. incorporated under special Acts.

It will be seen hereafter that the holder of a mortgage or debenture secured upon the undertaking of a railway, or other company established for carrying out a public object, is not entitled to foreclosure or sale (*d*). Except in cases coming within the Railway Companies Act, 1867, the proper remedy of such a creditor is either to bring an action to recover the amount, or to apply to the Court for the appointment of a receiver to protect his security (*e*). The power of the Court to make the appointment is independent of any Act of Parliament, and may be exercised though the special Act does not expressly authorize such appointment (*f*).

Where a receiver will be appointed.

The mortgagee or debenture holder is entitled to a receiver of the tolls and earnings of the company (*g*), although no time for payment of the principal is fixed, if he has given six months' notice (*h*); but the receivership order must be subject to prior incumbrances, and to the right of user of the undertaking for the purposes of the company, and to the powers of management in the directors (*i*).

Right of judgment creditors to a receiver.

A judgment creditor of a railway or canal company has a right to the appointment of a receiver of the tolls and traffic receipts (*k*). As between a judgment creditor and a mortgagee

Co., 41 Ch. D. 399; *Marshall* v. *South Staffordshire Tramways Co.*, (1895) 2 Ch. 36.

(*c*) *Marshall* v. *South Staffordshire Tramways Co.*, *sup.*, at p. 54; *Pegge* v. *Neath District Tramways Co.*, (1895) 2 Ch. 508.

(*d*) *Re Cornwall Minerals Rail. Co.*, W. N. (1882) 132, C. A. See *post*, p. 1033.

(*e*) *Gardner* v. *London, Chatham & Dover Rail. Co.*, L. R. 2 Ch. 201; *Blaker* v. *Herts, &c. Waterworks Co.*, 41 Ch. D. 399; *Bartlett* v. *West Metropolitan Tramways Co.*, (1893) 3 Ch. 437; *Marshall* v. *South Staffordshire Tramways Co.*, (1895) 2 Ch. 36.

(*f*) *De Winton* v. *Mayor of Brecon*, 26 Beav. 533.

(*g*) *Furness* v. *Caterham Rail. Co.*, 25 Beav. 614, 619; *De Winton* v. *Mayor of Brecon*, 26 Beav. 533; *Gardner* v. *London, Chatham & Dover Rail. Co.*, L. R. 2 Ch. 201, 213, 217; *Wickham* v. *New Brunswick, &c. Co.*, L. R. 1 P. C. 64.

(*h*) *Hopkins* v. *Worcester, &c. Canal Proprietors*, L. R. 6 Eq. 437.

(*i*) *Potts* v. *Warwick & Birmingham Canal Co.*, Kay, 146.

(*k*) *Potts* v. *Warwick & Birmingham Canal Co.*, Kay, 145; *Imperial & Mercantile Credit Ass.* v. *Newry & Armagh Rail. Co.*, Ir. R. 2 Eq. 524; *Kingston* v. *Cowbridge Rail. Co.*, 41 L. J. Ch. 152.

whose security is prior to the recovery of the judgment, the rights of the former will be subject to the rights of the receiver appointed by the mortgagee (*l*), and also to the right of user of the undertaking, and the costs of management (*m*). Where a judgment creditor was in possession, it was ordered that he should be served with notice of the appointment of a receiver at the instance of a mortgagee, so that he might, if he thought fit, apply to discharge the order appointing the receiver (*n*).

Interruption of traffic.

In making the appointment of a receiver of the tolls and earnings of a public company, the Court will, as far as possible, endeavour to prevent the inconvenience to the public which would arise by interruption of, or interference with, the ordinary conduct of the undertaking (*o*).

Receiver of undertaking of joint stock company.

A mortgagee or debenture holder of a joint stock company whose security is charged on the undertaking, property, or assets of the company, is entitled to the appointment of a receiver if the security is in jeopardy, though no interest is in arrear (*p*); and, in a proper case, he may obtain the appointment of a receiver and manager (*q*), even though the debenture debt has not yet actually become due (*r*).

Mortgagee must sue on behalf of creditors.

Mortgagees or debenture holders must generally sue on behalf of themselves and all others of the same class, though all need not concur in the application (*s*); and if one take judgment and issue execution, he must hold the proceeds in trust for all the mortgagees or debenture holders (*t*).

Winding up.

Where a receiver has been appointed in a debenture holder's

(*l*) *Legg* v. *Mathieson*, 2 Giff. 71; *Wildy* v. *Mid Hants Rail. Co.*, 16 W. R. 409.

(*m*) See cases cited in note (*k*).

(*n*) *De Winton* v. *Mayor of Brecon*, 26 Beav. 539.

(*o*) See *Fripp* v. *Chard Rail. Co.*, 11 Hare, 241; *Potts* v. *Warwick & Birmingham Canal Co.*, Kay, 146; *Ames* v. *Birkenhead Docks*, 20 Beav. 350.

(*p*) *Macmahon* v. *North Kent Ironworks Co.*, (1891) 2 Ch. 149; *Bissill* v. *Bradford Tramways Co.*, W. N. (1891) 51; *Thorn* v. *Nine Reefs*, 67 L. T. 93, C. A.; *Re Victoria Steamboats Co.*, (1897) 1 Ch. 158.

(*q*) *Peek* v. *Trinsmaran Iron Co.*, 2 Ch. D. 115; *Campbell* v. *Lloyd's Bank*, 58 L. J. Ch. 424; *Makins* v. *Percy Ibotson & Sons*, (1891) 1 Ch. 133; *Edwards* v. *Standard Rolling Stock Syndicate*, (1893) 1 Ch. 574.

(*r*) *Re Victoria Steamboats Co.*, (1897) 1 Ch. 158.

(*s*) *Mellish* v. *Brookes*, 3 Beav. 22; *Potts* v. *Warwick, &c. Co.*, Kay, 142; *Fripp* v. *Chard Rail. Co.*, 11 Ha. 241; *Legg* v. *Mathieson*, 2 Giff. 71.

(*t*) *Bowen* v. *Brecon Rail. Co.*, L. R. 3 Eq. 541; *Fountaine* v. *Carmarthen Rail. Co.*, L. R. 5 Eq. 316, 324; *Potteries, &c. Rail. Co.* v. *Minor*, L. R. 6 Ch. 621, 623. But see *Re Potteries, &c. Rail. Co.*, L. R. 5 Ch. 67; *Hart* v. *East Union Rail. Co.*, 7 Exch. 246; 8 Exch. 116; *Bolckow* v. *Herne Bay Pier Co.*, 1 E. & B. 74.

action, the right to have the receiver continued is not taken away by an order to wind up the company (*u*).

Uncalled capital.

A receiver may on giving the liquidator an indemnity use the name of the latter for the purpose of recovering the calls made by him (*x*).

Receiver as manager of a business.

Where mortgagors, whether private individuals or joint stock companies, are carrying on a trade or business, a receiver appointed by the Court will, in a proper case, be appointed manager of the business at the instance of the mortgagee or the debenture holders. The difference between a receiver and manager is clear; the receiver merely takes the income and pays the necessary outgoings; the manager takes over and carries on the business (*y*).

Instances of such appointment.

Managers have been appointed on the application of mortgagees of a newspaper (*z*), of an hotel (*a*), of collieries and other mines (*b*), and of a ship (*c*).

Business must be included in security.

A receiver appointed by the Court will not be directed to manage a business, unless the business is expressly or by clear implication, included in the security (*d*). The Court has power to appoint a receiver and manager of a colliery at the instance of a mortgagee or debenture holder, though the business is not specifically mentioned in the instrument of charge (*e*).

Appointment is provisional.

The Court will not undertake the permanent conduct of a business; and accordingly, where a manager of a business is appointed by the Court, the appointment is merely *ad interim* with a view to the sale of the business as a going concern (*f*).

It is the duty of a receiver and manager appointed by the Court to preserve the assets by carrying into effect existing contracts and entering into such new contracts as are necessary for carrying on the business, but not so as to impose, by specu-

(*u*) *Strong* v. *Carlyle Press* (No. 1), (1893) 1 Ch. 268. See *Whitley* v. *Challis*, (1892) 1 Ch. 64, C. A.

(*x*) *Re Westminster Syndicate*, W. N. (1908) 236.

(*y*) Per Jessel, M.R., in *Re Manchester & Milford Rail. Co.*, 14 Ch. D. 645, at p. 653, C. A.

(*z*) *Chaplin* v. *Young*, 6 L. T. N. S. 97.

(*a*) *Truman* v. *Redgrave*, 18 Ch. D. 547; *Re Leas Hotel Co.*, (1902) 1 Ch. 332. And see *Leney* v. *Callingham*, (1908) 1 K. B. 79.

(*b*) *Peek* v. *Trinsmaran Iron Co.*, 2 Ch. D. 115; *Campbell* v. *Lloyd's Bank*, 58 L. J. Ch. 424; *County of Gloucester Bank* v. *Rudry Merthyr Colliery Co.*, (1895) 1 Ch. 629, C. A.

(*c*) *Fairfield Shipbuilding, &c. Co.* v. *London, &c. Steamship Co.*, W. N. (1895) 64.

(*d*) *Whitley* v. *Challis*, (1892) 1 Ch. 64, C. A.

(*e*) *Campbell* v. *Lloyd's Bank*, 58 L. J. Ch. 424.

(*f*) Per Lord Cairns, in *Gardner* v. *London, Chatham & Dover Rail. Co.*, L. R. 2 Ch. 201, at p. 212. See also *Day* v. *Sykes, Walker & Co.*, W. N. (1886) 209; *Re Victoria Steamboats Co.*, (1897) 1 Ch. 158.

lative dealing or otherwise, onerous liabilities on the partners or company (*g*).

Dismissal of servants, &c.

The appointment by the Court of a receiver and manager of a business at the instance of the mortgagee operates as a dismissal of the clerks and servants of the mortgagor employed in the business (*h*).

Appointment of managing director of company as receiver and manager.

Where the only debenture holder of a company brought an action to enforce his securities, the Court, on his application, appointed the managing director of the company to be receiver and manager of its property and business for the purpose of selling the business as a going concern, the plaintiff undertaking to find a sum for working expenses, and to sell the property as soon as possible (*i*).

The Court will not appoint a manager of a market or of the affairs of a corporation (*k*).

Land out of jurisdiction.

The Court has jurisdiction to appoint receivers or managers of real or personal property abroad. So, receivers have been appointed to manage landed property or trading concerns in Ireland (*l*), the Channel Islands (*m*), British India (*n*), the West Indies (*o*), Brazil (*p*), and other places (*q*). So, also, the Court may appoint a receiver of so much of the rents and profits of property situate in a foreign country as come into the hands of a mortgagor resident in this country (*r*).

Receiver of property abroad.

A person resident in this country may be appointed receiver and manager of property abroad, with power to appoint an agent resident in the country where the property is situated. Or a person resident in that country may be appointed receiver and manager; in which case it is usual also to appoint a consignee in this country, to whom all moneys received are to be remitted (*s*).

(*g*) *Taylor* v. *Neate*, 39 Ch. D. 538 (receiver appointed on dissolution of partnership). See also *Sargant* v. *Read*, 1 Ch. D. 600; *Strapp* v. *Bull, Sons & Co.*, (1895) 2 Ch. 1, C. A.

(*h*) *Reid* v. *Explosives Co.*, 19 Q. B. D. 264, C. A.; *Re Marriage, Neave & Co.*, (1896) 2 Ch. 663, C. A.

(*i*) *Makins* v. *Percy Ibotson & Sons*, (1891) 1 Ch. 133. See *Edwards* v. *Standard Rolling Stock Syndicate*, (1893) 1 Ch. 574.

(*k*) *De Winton* v. *Mayor, &c. of Brecon*, 26 Beav. 542.

(*l*) *Houlditch* v. *Lord Donegal*, 8 Bli. N. S. 343.

(*m*) *Smith* v. *Smith*, 10 Ha. App. lxxi.

(*n*) *Keys* v. *Keys*, 1 Beav. 425.

(*o*) *Bunbury* v. *Bunbury*, 1 Beav. 336.

(*p*) *Sheppard* v. *Oxenford*, 1 K. & J. 500.

(*q*) See Dan. Ch. Pr. 1426.

(*r*) *Mercantile Investment Trust Co.* v. *River Plate, &c. Co.*, (1892) 2 Ch. 303.

(*s*) See Seton on Decrees (7th ed.), 779.

A receiver is not put in possession of foreign property by the mere order of an English Court; the requirements of the law of the country where the property is situate must also be complied with (*t*).

Consignee.

By Ord. LXXI. r. 1, the expression "receiver" includes a consignee or manager appointed under an order of the Court. The course of procedure on an application for the appointment of a consignee or manager is accordingly the same as in the case of a receiver.

Commission, &c. of manager.

A manager will be entitled to commission for his personal care and attention (*u*), and to reasonable allowances for expenses of management (*x*), including all expenses of carrying out existing contracts (*y*), and of borrowing money (*z*). He is also entitled to be allowed interest on balances found due to him on taking the accounts, and to a lien on the estate for such balances, and for any payments made by him under the direction of the Court (*a*).

Selection of receiver is in discretion of Court.

iv.—Who may be appointed Receiver.—"If the Court appoints a receiver at the instance of a mortgagee, the mortgagee not having, without the assistance of the Court, power to appoint a receiver, then the Court exercises its discretion as to who shall be appointed receiver, and appoints the receiver whom it thinks best to appoint for the interest of the mortgagee and of the mortgagor, a person whom, having regard to the interests of both parties, the Court considers the best person" (*b*).

Right to propose person as receiver.

As a general rule, the right to propose a person for the appointment of receiver belongs to the party interested in obtaining the appointment, and effect will be given to his nomination (*c*).

Party to action.

A party to the action will not, as a general rule, be appointed (*d*); but a mortgagee has been appointed with the consent of the mortgagor (*e*); and in urgent cases a mortgagee has

(*t*) *Re Maudslay, Sons & Field*, (1900) 1 Ch. 602.
(*u*) *Forrest* v. *Elwes*, 2 Mer. 69; *Chambers* v. *Goldwin*, 9 Ves. 273.
(*x*) *Forrest* v. *Elwes, sup.*
(*y*) *Strapp* v. *Bull, Sons & Co.*, (1895) 2 Ch. 1, C. A.; *Re Boynton*, (1910) 1 Ch. 519.
(*z*) *Post*, Chap. XLVI., Sect. II. (viii).
(*a*) *Bertrand* v. *Davies*, 31 Beav. 436.
(*b*) Per Cotton, L.J., in *Re Henry Pound, Son & Hutchins*, 42 Ch. D. 402, at p. 419, C. A.
(*c*) *Att.-Gen.* v. *Day*, 2 Madd. 246; *Sargant* v. *Read*, 1 Ch. D. 600.
(*d*) *Re Lloyd, Allen* v. *Lloyd*, 12 Ch. D. 447, at p. 451, C. A.
(*e*) *Re Prytherch, Prytherch* v. *Williams*, 42 Ch. D. 590.

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been appointed *ex parte* (*f*). A party so appointed will not as a rule be allowed any salary (*g*); but the rule is not inflexible (*h*). A party, by being appointed receiver, does not thereby lose his privileges as a party to the cause (*i*).

Solicitor.

The mortgagee's solicitor will not, under any circumstances, be appointed receiver, even though the mortgagor consent, for it is the duty of such solicitor to supervise and check the conduct of the receiver (*k*). But there is no objection to the appointment of a solicitor, as such, to be a receiver (*l*).

As to public companies.

In selecting the person to be appointed a receiver of any company whose undertaking is of a public nature, the Court will have regard to the interests of the public; and generally, in selecting a receiver and manager of the property and business of a company, the Court will avoid the appointment of any person whose individual interests might conflict with the duties of his office in respect to those for whose benefit the appointment is made (*m*).

As to joint stock companies.

In the case of securities given by a joint stock company, where an application is made by a mortgagee or debenture holder for a receiver after a winding-up order has been made, the Court may appoint the official receiver (*n*) or the liquidator to be receiver (*o*), unless the Court should see fit to appoint some other person (*p*). But a receiver appointed by the mortgagee before the winding-up will not be removed in order to substitute the liquidator if the mortgagee will be prejudiced by such substitution (*q*); and so, also, if there is only a small amount of unpaid capital to be got in (*r*). In one

(*f*) *Taylor* v. *Eckersley*, 2 Ch. D. 302; *Hyde* v. *Warden*, 1 Ex. D. 309; *Fuggle* v. *Bland*, 11 Q. B. D. 711.

(*g*) *Wilson* v. *Greenwood*, 1 Swanst. 471, 483; *Carew* v. *Johnston*, 2 Sch. & L. 301; *Blakeney* v. *Dufaur*, 15 Beav. 40, 44; *Hoffman* v. *Duncan*, 18 Jur. 69; *Sargant* v. *Read*, 1 Ch. D. 600; *Re Prytherch*, *Prytherch* v. *Williams*, 42 Ch. D. 590.

(*h*) *Re Bignell*, (1892) 1 Ch. 59.

(*i*) Per Lord Cottenham, C., in *Scott* v. *Platel*, 2 Ph. 229, 230.

(*k*) *Garland* v. *Garland*, 2 Ves. Jun. 137; *Re Lloyd*, *Allen* v. *Lloyd*, 12 Ch. D. 447, C. A.

(*l*) *Wilson* v. *Poe*, 1 Hog. 322; *Della Cainea* v. *Hayward*, M'Clel. & Y. 272.

(*m*) *Fripp* v. *Chard Rail. Co.*, 11 Ha. 241.

(*n*) Comp. Act, 1908, s. 162.

(*o*) *Perry* v. *Oriental Hotels Co.*, L. R. 5 Ch. 420; *Tottenham* v. *Swansea Zinc Ore Co.*, W. N. (1884) 54; *Willmott* v. *London Celluloid Co.*, W. N. (1885) 29; *Re Joshua Stubbs*, (1891) 1 Ch. 475, C. A.; *British Linen Co.* v. *South American and Mexican Co.*, (1894) 1 Ch. 108, C. A.

(*p*) *Giles* v. *Nuthall*, W. N. (1885) 51. See also *Boyle* v. *Bettws Llantwit Colliery Co.*, 2 Ch. D. 726.

(*q*) *Strong* v. *Carlyle Press*, (1893) 1 Ch. 268, C. A.

(*r*) *Re Joshua Stubbs*, (1891) 1 Ch. 475, C. A.

case the Court appointed a receiver on behalf of the debenture holders in respect of these particular securities, and appointed the official liquidator to be receiver of the assets of the company not comprised in the securities (*s*).

Appointment of liquidator does not oust receiver.

Where the mortgagees or debenture holders have a right under their security to appoint a receiver, and have exercised that right, the appointment of a liquidator will not oust the receiver, though some of the powers of the receiver so appointed may be superseded by the powers of the liquidator acting under the authority of the Court (*t*).

Discharge of receiver and appointment of liquidator in his place.

But if the debenture holders have, either before or after the winding up, obtained an order in their action for the appointment of a receiver, and subsequently a liquidator is appointed in the winding up, the Court will, in the absence of special circumstances, discharge the receiver so appointed and appoint the official liquidator in his place, in order to avoid unnecessary expense and delay in getting in the assets (*u*). But this rule will be departed from if it appears that the assets are such as are likely to be more advantageously and expeditiously realized by the receiver (*x*).

Discretion of Court not interfered with.

The Court of Appeal will not, in the absence of special circumstances, overrule the discretion of the Court below as regards the appointment of the liquidator to act as receiver in the first instance, or in the place of a receiver previously appointed (*y*).

Security generally necessary to complete appointment.

v.—Security to be given by Receiver.—The appointment of a receiver is not complete so as to enable him to enter upon his duties and exercise his powers until he has given security (*z*); except where such security is dispensed with under the terms of the order, in which case the appointment is complete from the date of his appointment (*a*).

Relation back of appointment.

An appointment perfected by security afterwards given relates back to the date of the order appointing a receiver (*b*).

(*s*) *Industrial and General Trust* v. *South American and Mexican Co.*, (1894) 1 Ch. 108, C. A.

(*t*) *Re Henry Pound, Son & Hutchins*, 42 Ch. D. 402, C. A.

(*u*) *Re Joshua Stubbs*, (1891) 1 Ch. 475, C. A.

(*x*) *British Linen Co.* v. *South American and Mexican Co.*, (1894) 1 Ch. 108, C. A.

(*y*) *Giles* v. *Nuthall*, W. N. (1885) 51; *Re Joshua Stubbs*, *sup.*

(*z*) *Edwards* v. *Edwards*, 2 Ch. D. 291.

(*a*) *Taylor* v. *Eckersley*, 2 Ch. D. 302, C. A.; *S. C.*, 5 Ch. D. 740. See *Hewett* v. *Murray*, 57 L. J. Ch. 572; *Morrison* v. *Skerne Ironworks Co.*, 60 L. T. 588.

(*b*) *Exp. Evans*, 13 Ch. D. 252;

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By R. S. C. Ord. L. r. 16, "where an order is made directing a receiver to be appointed, unless otherwise ordered, the person to be appointed shall first give security, to be allowed by the Court or a judge and taken before a person authorized to administer oaths, duly to account for what he shall receive as such receiver, and to pay the same as the Court or judge shall direct" (*c*). But where the amount for which security is to be given does not exceed £500, such security may be given by an undertaking, which must be signed by the sureties and filed (*d*). A direction that the receiver shall give security is now, therefore, superfluous and usually omitted; if the security is to be dispensed with or not to be required until a particular time, this should be expressed in the order (*e*).

Sureties.

The security required is usually the recognizances of the receiver, with two sureties, for double the annual rental; or, if the receiver is to get in a capital sum, for the amount of such capital sum (*f*). The sureties must be resident within the jurisdiction (*g*). Under special circumstances, a receiver may be appointed on his own recognizances only (*h*).

The Court will not generally dispense with sureties, even by consent of the parties interested (*i*); but if they, being competent to consent, will appoint a receiver of their own authority, the Court will allow him to act without finding sureties (*k*).

Guarantee society.

It is now very usual for the Court to accept the security of a guarantee society by bond entered into by the receiver and the society, and where the amount does not exceed £2,000 a recognizance is dispensed with.

Effect of possession of receiver.

vi.—Possession of Receiver.—A receiver appointed by the Court is an officer of the Court (*l*). The possession of the receiver is accordingly the possession of the Court, and the effect of his appointment is to remove the mortgagor from possession of the property (*m*); and his possession will prevail against the

but see *Ridout* v. *Fowler*, (1904) 1 Ch. 658.

(*c*) For form of recognizance, see R. S. C. App. L. No. 21.

(*d*) Ord. L. r. 16A. For form of undertaking, see R. S. C. App. L. No. 21A.

(*e*) *Morrison* v. *Skerne Ironworks Co.*, 60 L. T. 588.

(*f*) Dan. Ch. Pr. (7th ed.) 1432.

(*g*) *Cockburn* v. *Raphel*, 2 S. & St. 453.

(*h*) *Carlisle* v. *Berkley*, Amb. 599; *Hibbert* v. *Hibbert*, 3 Mer. 681.

(*i*) *Manners* v. *Furze*, 11 Beav. 30; *Tylee* v. *Tylee*, 17 Beav. 583.

(*k*) *Ridout* v. *Earl of Plymouth*, 1 Dick. 68; *Manners* v. *Furze*, *sup.*

(*l*) *Aston* v. *Heron*, 2 My. & K. 391; *Owen* v. *Homan*, 4 H. L. C. 1032.

(*m*) *Russel* v. *East Anglian Rail. Co.*, 3 Mac. & G. 104; *Ames* v. *Birkenhead Docks*, 20 Beav. 350.

title of the mortgagor's trustee in bankruptcy and exclude the doctrine of reputed ownership (*n*).

Remedies of mortgagee not prejudiced.

But a receiver appointed by the Court on the application of a mortgagee is, for some purposes, the agent of the mortgagor, so that payment of interest by such receiver to the mortgagee pursuant to the order is sufficient to keep alive the remedies of the mortgagee (*o*).

Administration action.

Moneys got in by a receiver appointed by the Court in an administration action are not *in custodiâ legis* for the benefit of a mortgagee, as in the case of a sequestrator, but are assets in the hands of the receiver for the benefit of all parties interested according to their respective rights and priorities (*p*).

Delivery of possession by mortgagor.

When the mortgagor is in personal occupation, the receivership order directs him to attorn tenant, or to give up possession to the receiver (*q*). Where in an action for foreclosure judgment had not been given, but an order had been made appointing a receiver and manager of the business, North, J., refused to order delivery of possession before trial (*r*).

In a recent case an order was made, with the consent of the mortgagee, that the mortgagor should remain in possession and attorn tenant to the receiver at an occupation rent of an amount to be fixed at chambers, and to be payable as from the date of such order, or, in the alternative, to deliver up possession to the receiver (*s*).

Attornment of tenants.

Where the mortgagor is not in personal occupation, the tenants are ordered to attorn and pay their rents to the receiver (*t*).

Where the order was in the ordinary form directing the tenants to attorn to the receiver, but it appeared that the mortgagor himself was in personal occupation of the mortgaged lands, it was held that, the possession of the mortgagor being rightful, he was liable to an occupation rent only from the date on which the receiver demanded of him delivery of possession, and not from the date of the order appointing a receiver (*u*).

(*n*) *Taylor* v. *Eckersley*, 5 Ch. D. 740.

(*o*) *Chinnery* v. *Evans*, 11 H. L. C. 134. See 3 & 4 Will. IV. c. 27, s. 40. See further on this point, *post*, p. 1010.

(*p*) *Re Hoare*, *Hoare* v. *Owen*, (1892) 3 Ch. 94.

(*q*) *Hawkes* v. *Holland*, W. N. (1881) 128, C. A. See *Edgell* v. *Wilson*, W. N. (1893) 145.

(*r*) *Taylor* v. *Soper*, 62 L. T. 828.

(*s*) *Re Burchnall*, *Walker* v. *Burchnall*, W. N. (1893) 171.

(*t*) *Pitt* v. *Snowden*, 3 Atk. 750; *Hughes* v. *Hughes*, 3 Bro. C. C. 87.

(*u*) *Yorkshire Banking Co.* v. *Mullan*, 35 Ch. D. 125.

Delivery of personal property.

If the property comprised in the mortgage is personal estate, the order will be that the mortgagor do deliver to the receiver all such property, together with all securities (if any) for the same and all books and letters relating thereto (*x*).

Mixed fund.

If both realty and personalty are included in the security, the receiver may be directed to keep separate accounts of the rents and profits of the real estate and of the personal estate (*y*).

Duty of receiver to demand possession.

Where the mortgagor is in personal possession and occupation of the property, and an order has been made to deliver such possession, it is the duty of the receiver, as soon as he has obtained the certificate completing his appointment, to demand possession, and in case of the refusal of the mortgagor, to report the matter to the mortgagee's solicitor, who will cause the order for delivery of possession to be served on the mortgagor (*z*). If the mortgagor should still refuse to deliver up possession, the order for delivery may be enforced by writ of possession (*a*), which should specifically indicate the property of which possession is to be delivered (*b*). The application for the writ should be accompanied by an affidavit showing due service of the order for delivery, and that the order has not been obeyed (*c*). The affidavit need only show that the order was not complied with within the time limited; it is not necessary to show that the non-compliance continued at the time of application for the writ (*d*). Where it is found impossible to serve personally on the mortgagor the order for delivery of possession by reason of his keeping out of the way, the writ may be granted on affidavit of this fact (*e*).

Demand of attornment.

Where any of the tenants refuse to attorn, the mortgagee's solicitor will personally serve the tenant with a copy of the order and certificate, and with notice in writing signed by the receiver, requiring him to attorn and pay his rent to the receiver (*f*). If the tenant should still refuse, he should be served with notice of motion requiring him to attorn and pay within a limited time (*g*). The alleged tenant may appear and resist the motion

(*x*) *Truman* v. *Redgrave*, 18 Ch. D. 547.
(*y*) *Hill* v. *Hibbit*, 18 L. T. N. S. 553.
(*z*) *Green* v. *Green*, 2 Sim. 430. See *Ireland* v. *Eade*, 7 Beav. 55; *Parker* v. *Dunn*, 8 Beav. 497.
(*a*) R. S. C. Ord. XLVII. r. 1.
(*b*) *Finn* v. *Sarl*, (1891) 2 Ch. 79.
(*c*) R. S. C. Ord. XLVII. r. 2.
(*d*) *Webster* v. *Taylor*, 18 Jur. 869.
(*e*) *De la Borde* v. *Othon*, W. N. (1874) 219.
(*f*) Dan. Ch. Pr. 1438. For form of notice, see Dan. Ch. Forms, 1723.
(*g*) For form of notice of motion, see Dan. Ch. Forms, 1725.

on the ground that, though in possession, he is not a tenant (*h*).

Default of tenant to attorn on demand.

If the tenant does not appear, the order on the motion will be made on an affidavit of service of the original order for attornment, the certificate, the notice to attorn, and the notice of motion and of the refusal to attorn (*i*). If the tenant still refuses, a writ of attachment will issue in the ordinary way (*k*).

Occupation rent.

If a person alleged to be a tenant satisfies the Court that he is not in possession as such, but merely by the permission of the mortgagor, he may be ordered to pay to the receiver an occupation rent to be fixed at chambers (*l*).

Receiver of manor.

When a receiver of a mortgaged manor is appointed, the steward of the manor, as agent of the lord, may be ordered to deliver up the court rolls to the receiver (*m*); but such an order has been refused where there was no proof of misconduct on the part of the steward (*n*).

Chattels.

If a mortgagor who is ordered to deliver up personal property, other than leaseholds, to a receiver, refuses to do so, the mortgagee may, upon the production of affidavits of service of the order, &c., and of the facts, obtain, on *ex parte* summons, a writ of delivery, which will be enforced by issue of execution, or by distraining by the sheriff (*o*). Although for the purpose of recovering land the old writ of assistance has been superseded by the writ of possession, a writ of assistance may still be issued for the purpose of obtaining specific delivery of chattels which have been ordered to be delivered to a receiver (*p*).

Interference with receiver.

Any interference with the possession of the receiver amounts to a contempt of Court punishable by committal (*q*). Generally, however, unless the contempt is persisted in, the Court will merely order the offender to pay all costs and expenses caused by his conduct (*r*). A particular interference with the possession of a receiver may be restrained by injunction, which, in a proper case, may be granted on an *ex parte* application (*s*).

(*h*) *Reid* v. *Middleton*, T. & R. 455; *Hobhouse* v. *Hollcombe*, 2 De G. & S. 208.

(*i*) For form of affidavit, see Dan. Ch. Forms, 1727. For form of order, see Seton on Decrees, 762.

(*k*) See Dan. Ch. Pr. 1438.

(*l*) See *Hobson* v. *Sherwood*, 19 Beav. 575.

(*m*) *Rawes* v. *Rawes*, 7 Sim. 624.

(*n*) *Windham* v. *Giubilei*, W. N. (1871) 119.

(*o*) R. S. C. Ord. XLVIII.

(*p*) *Wyman* v. *Knight*, 39 Ch. D. 166.

(*q*) *Hawkins* v. *Gathercole*, 1 Drew. 12; *Exp. Cochrane*, L. R. 20 Eq. 282; *Helmore* v. *Smith*, 35 Ch. D. 449.

(*r*) *Lane* v. *Sterne*, 3 Giff. 629.

(*s*) *Evelyn* v. *Lewis*, 3 Ha. 472; *Tink* v. *Rundle*, 10 Beav. 318; *Randfield* v. *Randfield*, 1 Dr. & S. 310; *Bayly* v. *Went*, 51 L. T. 764.

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It is not contempt of Court to interfere with a receiver until he has perfected his appointment (*t*).

When a receiver has been appointed by the Court, it would be contempt in the first mortgagee or any creditors to proceed against the premises without the consent of the Court (*u*), and in a solicitor for parties interested to advise the receiver not to carry on the business (*x*).

Receiver irregularly appointed.

No interference will be allowed, even though the receiver's appointment is irregular (*y*); but leave may be given to try a right against a receiver (*z*).

Rights not prejudiced.

The appointment of a receiver does not in any way prejudice the rights of parties to the action (*a*).

Misconduct of receiver.

If the receiver acts contrary to his duty, an action cannot be brought against him: the proper course is an application in the action in which he is receiver (*b*).

Remedy of persons claiming by paramount title.

Where any persons claim possession by paramount title of property over which a receiver has been appointed, leave may be given to them to pursue their remedies if there has been no undue delay on their part; or, an inquiry may be directed as to the claimants' interest in the property (*c*). The course to be adopted, in the case of a receiver, as in the case of a sequestrator, is in the discretion of the Court, and will be exercised according to what appears, under the circumstances, to be the best mode of trying the right (*d*).

Appointment cannot be questioned.

A claimant is in no case justified in questioning the order appointing the receiver, or in attempting to obtain possession in disobedience to such order (*e*).

General duties of a receiver.

vii.—**Powers and Duties of Receivers.** Receivers appointed by the Court are regulated, as to their powers and duties, by the

(*t*) *Edwards* v. *Edwards*, 2 Ch. D. 291; *Re Maudslay, Sons & Field*, (1900) 1 Ch. 602.

(*u*) *Brooks* v. *Greathed*, 1 J. & W. 178; *Angel* v. *Smith*, 9 Ves. 335; *Bryan* v. *Cormick*, 1 Cox, 422; *Ames* v. *Birkenhead Docks Co.*, 20 Beav. 332; *Russell* v. *East Anglian Rail. Co.*, 3 Mac. & G. 104; *Gooch* v. *Haworth*, 3 Beav. 428; *Exp. Cochrane*, L. R. 20 Eq. 282.

(*x*) *Exp. Hayward*, W. N. (1881) 115, C. A.

(*y*) *Ames* v. *Birkenhead Docks*, 20 Beav. 332.

(*z*) *Randfield* v. *Randfield*, 3 De G. F. & J. 766.

(*a*) *Sharp* v. *Carter*, 3 P. Wms. 379; *Skipp* v. *Harwood*, 3 Atk. 564; *Wells* v. *Kilpin*, L. R. 18 Eq. 298.

(*b*) *Searle* v. *Choat*, 25 Ch. D. 723.

(*c*) *Brooks* v. *Greathed*, 1 J. & W. 178; *Reeves* v. *Cox*, 13 Ir. Eq. R. 247; *Lane* v. *Capsey*, (1891) 3 Ch. 411; *Morris* v. *Baker*, 73 L. J. Ch. 143.

(*d*) *Empringham* v. *Short*, 3 Hare, 461.

(*e*) *Russell* v. *East Anglian Rail. Co.*, 3 Mac. & G. 104.

terms of the order appointing them. The duties of a receiver appointed by an order framed in general terms are simply to take possession of the mortgaged property, to get in the rents and profits, to pay necessary outgoings, and to pay over the surplus, after retaining thereout his own remuneration, into Court or as directed by order of the Court. If a receiver is intended to sell the property, to grant leases, to carry out improvements or permanent repairs, or to perform any special duties, such matters should be expressly authorized by the order appointing him; or, if it should subsequently be found necessary to arm the receiver with powers for special objects not mentioned in the order, an application must be made for that purpose (*f*).

Where a receiver is appointed in a debenture-holder's action, a direction is inserted in the order that he do forthwith pay preferential debts out of the assets (*g*).

Right to rents in arrear.

A receiver appointed by the Court is entitled to all rents in arrear at the time of his appointment, as well as to all future rents accruing due during his receivership (*h*). But a receiver is not entitled to the produce of a mortgaged estate severed and removed prior to the appointment, though not then converted into money (*i*).

Improper receipt of rents by third person.

Where a mortgagee's solicitor had received rents in a cause without the authority of the Court, before the receiver's appointment was completed, he was ordered to pay them over to the receiver on completion of his appointment, and was not allowed to retain such rents on the ground of lien, or to set them off against costs alleged to be due to him (*k*).

Where a person had obtained payment of certain debts adversely to the receiver, he was ordered within one week to make an affidavit of the amounts received by him, and to pay the same to the receiver, or in default to be committed (*l*).

Notice not to pay rents to receiver.

A tenant who had refused to pay rent to a receiver on the ground of having received from the defendant notice not to do

(*f*) *Gressley* v. *Adderley*, 1 Swanst. 573, 579. See *post*, p. 979.
(*g*) *Re Debenture-holders' Actions*, W. N. (1900) 58.
(*h*) *Codrington* v. *Johnstone*, 1 Beav. 520, 524; *M'Donnell* v. *White*, 11 H. L. C. 570.
(*i*) *Codrington* v. *Johnstone*, *sup.*
(*k*) *Wickens* v. *Townshend*, 1 R. & My. 361.
(*l*) *Parker* v. *Pocock*, 30 L. T. 458.

so, was, on motion, ordered to pay the arrears to the receiver with costs of the motion (*m*).

Payment to mortgagor before notice of appointment of receiver.

Where a receiver had been appointed to collect and get in personal estate, the Court refused to order a debtor to the estate, who had paid the money to the personal representative before he had notice of the order appointing a receiver, to pay the amount of the debt over again to the receiver (*n*).

The Court has allowed a debtor to the estate to pay the money into court instead of to the receiver, in order to save the poundage (*o*).

Receipt of rents after certificate.

Where a receiver has received rents between the date of the certificate under a foreclosure order and the day fixed for redemption, the mortgagee is not entitled to such rents, except on the terms of bringing them into account as between himself and the mortgagor, and a fresh day must be fixed for redemption (*p*), unless the express terms of the foreclosure order otherwise provide (*q*). Where it appeared that the rents had been so received, but that they were insufficient to cover receiver's remuneration and expenses, upon submission of the plaintiff to have his order for foreclosure discharged, the receiver's account was allowed to be taken at once, leaving the question of discharge of the receiver to stand over till after the taking of such account (*r*).

Power of distress.

Where tenants have attorned to a receiver, the receiver may distrain in his own name and without an order of the Court for rent in arrear within the year (*s*). Before attornment, the distress must be made in the name of the person in whom the legal estate is vested (*t*), and the receiver may do so without the leave of the Court (*u*), unless there be a doubt as to who has the legal right to the rent (*x*).

A receiver may employ a bailiff to distrain for rent due to the estate (*y*).

(*m*) *Hobson* v. *Sherwood*, 19 Beav. 575.

(*n*) *Kirk* v. *Houston*, 5 Ir. Eq. R. 498.

(*o*) *Haigh* v. *Grattan*, 1 Beav. 210.

(*p*) *Jenner Fust* v. *Needham*, 32 Ch. D. 582, C. A.

(*q*) *Colman* v. *Llewellyn*, 34 Ch. D. 143, C. A. See *Cheston* v. *Wells*, (1893) 2 Ch. 151; *Barber* v. *Jeckells*, W. N. (1893) 91; *Lusk* v. *Sebright*, 71 L. T. 59.

(*r*) *Ellenor* v. *Ugle*, W. N. (1895) 161.

(*s*) *Raincock* v. *Simpson*, Dick. 120; *Bennett* v. *Robins*, 5 C. & P. 379; Dan. Ch. Pr. 1443.

(*t*) *Hughes* v. *Hughes*, 3 Bro. C. C. 87.

(*u*) *Brandon* v. *Brandon*, 5 Madd. 473.

(*x*) *Pitt* v. *Snowden*, 3 Atk. 750.

(*y*) *Dancer* v. *Hastings*, 4 Bing. 2.

Leave to distrain, where necessary, may be obtained in chambers, and ordinarily by summons, but it is not usual to draw up a formal order (*z*).

Leave to distrain.

The receiver may distrain until he is discharged, notwithstanding abatement of the action (*a*).

Abatement of action.

Letting and managing property.

According to the present practice, since the statute 15 & 16 Vict. c. 80, directions as to letting and managing property are not generally inserted in orders appointing receivers, the Court having power to give such directions as to managing the property as may seem expedient (*b*).

Power to let property.

A receiver may now let the property on a yearly tenancy, or for any term not exceeding three years, without the sanction of the Court (*c*), but his power is limited to such parol leases as are authorized by the Statute of Frauds (*d*). A lease for a longer term of years, though binding as between the receiver and the lessee (*e*), will have no effect so as to bind the owner of the legal estate except with his concurrence; and the Court has no jurisdiction to empower the receiver to deal with the legal estate by granting a lease without such concurrence (*f*).

Best rent to be obtained.

A receiver must let the estate to the best advantage; but if he finds it let at an undervalue, he ought not to raise the rents without the leave of the Court (*g*).

Abatement of rents.

The consent of the persons beneficially entitled is necessary to empower a receiver to grant an abatement of rent, or to forego arrears due from tenants (*h*).

Notice to quit.

A receiver appointed by the Court has authority to determine tenancies by notice to quit (*i*); and if a tenant holds over after such notice, the receiver may, with the leave of the Court, sue the tenant for double rent under 4 Geo. II. c. 28, s. 1 (*k*).

Action by receiver.

A receiver must not, without the leave of the Court, bring any action to enforce payment of any moneys due to the

(*z*) Dan. Ch. Pr. 1443; *Hughes* v. *Hughes*, 3 Bro. C. C. 87. For form of order, see Seton on Decrees (7th ed.), 763.

(*a*) *Newman* v. *Mills*, 1 Hog. 291; *Brennan* v. *Kenny*, 2 Ir. Ch. R. 579, 583.

(*b*) See R. S. C. Ord. LV.

(*c*) See *Shuff* v. *Holdaway*, cit. in Dan. Ch. Pr. (7th ed.) 1443.

(*d*) 29 Car. II. c. 3, s. 2.

(*e*) *Dancer* v. *Hastings*, 4 Bing. 2.

(*f*) *Gibbins* v. *Howell*, 3 Madd. 469; *Evans* v. *Mathias*, 7 E. & B. 602.

(*g*) *Wynne* v. *Lord Newborough*, 1 Ves. Jun. 164.

(*h*) *Evans* v. *Taylor*, Sau. & Sc. 681.

(*i*) *Doe* v. *Reid*, 12 East, 61. See *Jones* v. *Phipps*, L. R. 3 Q. B. 567, 572. See *Earl of Mansfield* v. *Hamilton*, 2 Sch. & L. 28.

(*k*) *Wilkinson* v. *Colley*, 5 Burr. 2694.

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estate (*l*); if he does so, he will be liable personally to pay any costs incurred by such action should the action prove unsuccessful (*m*). Possibly, however, where, under special circumstances, a receiver has, without leave of the Court, instituted proceedings, the immediate taking of which seemed expedient, and where the result of such proceedings has been to get in to the estate moneys which might have been lost, the receiver would be allowed his extra costs and expenses (*n*). The Court will not generally give a receiver leave to bring an action against a debtor to the estate unless it appears, *primâ facie*, that the result of the action will benefit the estate (*o*).

Injunction to restrain waste.

If a tenant commits waste after a receiver has been appointed, it is not necessary to bring an action to restrain the waste, but an injunction will be granted on motion though the tenant is not a party to the cause (*p*).

Action by receiver not as such.

If, however, a debtor to the estate has given to the receiver a bill of exchange or promissory note for the amount due, the receiver may bring an action in his own name on the bill or note without leave of the Court as holder thereof, irrespective of his character as receiver (*q*); so, also, if chattels to which he is entitled as receiver are unlawfully detained from him, he may maintain an action to recover them as bailee, independently of the fact that he is a receiver (*r*).

Proceedings in bankruptcy.

A receiver is not a creditor entitled to present a bankruptcy petition within sect. 6 of the Bankruptcy Act, 1883 (*s*).

A receiver may, it seems, be made a party to a suit instituted against the owner or incumbrancer of the property, but he is not a necessary party (*t*).

Power to bring or defend actions.

A receiver should not bring or defend an action without the leave of the Court (*tt*). A receiver having, without the sanction of the Court, defended an action arising out of a dis-

(*l*) *Exp. Sacker*, 22 Q. B. D. 179, at p. 185.

(*m*) *Re Montgomery*, 1 Moll. 419; *Malcolm* v. *O'Callaghan*, 3 My. & Cr. 52, at p. 59.

(*n*) See *Nangle* v. *Lord Fingal*, 1 Hog. 142. See also *inf.* as to receivers defending actions without leave.

(*o*) *Davie* v. *John*, M'Cl. 575.

(*p*) *Walton* v. *Johnstone*, 15 Sim. 352; *Casamajor* v. *Strode*, 1 S. & St. 381.

(*q*) *Exp. Harris*, 2 Ch. D. 243. See *Exp. Sacker*, 22 Q. B. D. 179, at p. 185.

(*r*) *Hills* v. *Reeves*, 31 W. R. 209.

(*s*) 46 & 47 Vict. c. 52. See *Exp. Sacker*, *sup.*

(*t*) *Lewis* v. *Lord Zouche*, 2 Sim. 388; *Smith* v. *Earl of Effingham*, 7 Beav. 357.

(*tt*) *Viola* v. *Anglo-American Co.*, (1912) 2 Ch. 305.

tress for rent made by him on a tenant of the estate, the Court refused to allow him the costs of the action (*u*).

A receiver is entitled to be indemnified against the costs of actions brought against him, provided the defence to the action was for the benefit of the estate (*x*).

Power to institute proceedings in the cause.

Except under special circumstances of immediate necessity, the receiver is not the proper party to present a petition or originate any proceedings in the action in which he is appointed. If an emergency should arise necessitating directions or additional powers, he should apply to the party at whose instance he was appointed to make any necessary application to the Court. Should he refuse or neglect to do so, the receiver may be justified in applying on his own account (*y*). Such applications are usually made by summons at chambers.

In some reported cases, however, no objection seems to have been taken to applications made by receivers in their own names (*z*).

Summons for directions.

In two cases the receiver ought to apply by summons for directions; namely, where a large sum comes into his hands in the interval between the times fixed for passing his accounts, so that the sum may not lie idle (*a*); and where the order does not provide for payment of balances into the bank (*b*).

Payment of taxes and other outgoings.

Though a receiver may, on his own responsibility, pay taxes and necessary outgoings, and may also lay out a small amount in necessary expenses, which, as it would seem, ought not to exceed 30*l.* in any one year (*c*), he must not incur any serious expenditure in repairs without a previous application to the Court (*d*). Where, however, unauthorized expenditure by a receiver has resulted in lasting benefit to the estate, the Court, on being satisfied as to the reasonableness of the expenditure and of the benefit to the estate, may allow the receiver to be recouped the amount so expended by him (*e*). If it is necessary to cut timber or to get stone or brick-earth, &c., for repairs, application for leave so to do will be necessary (*e*).

(*u*) *Swaby* v. *Dickon*, 5 Sim. 620; but see *Bristowe* v. *Needham*, 2 Ph. 190.

(*x*) *Re Dunn*, (1904) 1 Ch. 648.

(*y*) *Parker* v. *Dunn*, 8 Beav. 497. See *Ireland* v. *Eade*, 7 Beav. 55; *Chater* v. *Maclean*, 1 Jur. N. S. 175.

(*z*) *Mills* v. *Fry*, 1 G. Coop. 107; *Wickens* v. *Townshend*, 1 R. & My. 361; *Evelyn* v. *Lewis*, 3 Ha. 472. See also (1902) 1 Ch. at p. 412; (1903) 2 Ch. at p. 684.

(*a*) *Shaw* v. *Rhodes*, 2 Russ. 539.

(*b*) *Potts* v. *Leighton*, 15 Ves. 273.

(*c*) Dan. Ch. Pr. (7th ed.) 1444, n.

(*d*) *Att.-Gen.* v. *Vigor*, 11 Ves. 563; *Waters* v. *Taylor*, 15 Ves. 10, 25; *Tempest* v. *Orde*, 2 Mer. 56.

(*e*) *Blunt* v. *Clitherow*, 6 Ves. 799.

Generally speaking, extraordinary expenses incurred by a receiver without the leave of the Court will not be allowed to him.

Extraordinary expenses.

A receiver must keep down all fee farm rents, head rents, or other rents to which the property is subject; if he fails to do so, he will be liable to pay the costs of proceedings instituted by the person entitled for recovery of rents (*f*).

Rent, fee farm rents, &c.

But in the case of a mortgage by sub-demise the receiver appointed in an action by the mortgagee against the mortgagor is under no liability to the head lessor for rent or other outgoings, even though he has sold the mortgagor's goods and so deprived the head lessor of his remedy by distress (*g*).

Repairs.

Necessary repairs fall within the scope of a receiver's duty, and he may at his own risk execute repairs of a more extensive kind, subject, however, to the liability to have the propriety of the expenditure questioned, unless he has obtained the leave of the Court (*h*).

A receiver appointed by a mortgagee under the Conveyancing Act will only be allowed costs of necessary or proper repairs directed in writing by the mortgagee as provided by the Act (*i*).

A receiver appointed in an action by a mortgagee by sub-demise is not liable to repair under a covenant in the head lease (*k*).

Improvements.

A receiver is not justified in expending money on improvements of the property; and such sanction will not generally be given unless upon very special grounds. So the Court, in appointing a receiver on motion, refused to authorize him to expend 100*l*. in putting leasehold houses, comprised in the mortgage, in a fit state for occupation; although 2,000*l*. was due on the mortgage, and no payment for principal or interest had been made for a considerable time, and most of the houses were unfinished and consequently unoccupied (*l*).

Expenditure in carrying on business.

Where a receiver and manager of a business, which is being carried on at a loss, is appointed, the Court has jurisdiction to sanction expenditure which may prevent the business from being closed, and may preserve it with a view to selling it as a going concern, but the expenditure must be shown to be of

(*f*) *Balfe* v. *Blake*, 1 Ir. Ch. R. 365.
(*g*) *Hand* v. *Blow*, (1901) 2 Ch. 721, C. A.
(*h*) *Re Graham, Graham* v. *Noakes*, (1895) 1 Ch. 66, 72.
(*i*) *White* v. *Metcalf*, (1903) 2 Ch. 567.
(*k*) *Hand* v. *Blow*, *sup.*
(*l*) *Meaden* v. *Sealey*, 6 Ha. 620.

urgent necessity, unless all parties interested consent to the application for the sanction of the Court thereto (*m*).

Raising money to carry on business.

Where a receiver and manager is authorized to raise by mortgage a certain sum for carrying on the business, it is his duty if he finds the sum insufficient to apply to the Court to increase it, and if he incurs further liability he is not entitled to be indemnified unless he can show that he was justified in incurring it without leave (*n*).

For the purpose of carrying on the business the receiver may create a valid charge on property comprised in debentures to have priority over the debentures (*o*).

Prior incumbrancer

A prior incumbrancer may apply to the receiver for the interest from time to time accruing due on his security; and if he so apply, the receiver will be bound to pay such interest, before paying in his balances. If no such application is made, the balances will be carried in, without any previous inquiry whether the prior incumbrancer has or has not received his interest (*p*).

Delivery and passing of receiver's accounts.

A receiver must bring in and pass his accounts regularly from time to time to show the actual balance in his hands, according to the prescribed form, on such days as the Court or judge shall fix for that purpose, and must pay in his balance on the days appointed; on default, the receiver's salary may be disallowed, and he may be charged at the rate of 5 per cent. per annum on unpaid balances (*q*). The accounts must be verified by an affidavit in the prescribed form (*r*).

Default of receiver.

The rule as regards a receiver in default may be enforced notwithstanding that the accounts have been settled (*s*), or even after the receiver has been discharged (*t*).

Consequences of default.

By the Rules of the Supreme Court, Ord. L. r. 21, on default by a receiver in bringing in any account or in making any payment, the parties may be required to attend at chambers, and proper directions may be given, including the discharge

(*m*) *Securities, &c. Investment Corp.* v. *Brighton Alhambra*, 62 L. J. Ch. 516. See also *Exp. Grissell*, 3 Ch. D. 411, C. A.; *Falcke* v. *Scottish Imperial Insurance Co.*, 34 Ch. D. 234, C. A.

(*n*) *Re British Power, Traction, &c. Co.*, (1906) 1 Ch. 497.

(*o*) *Robinson Printing Co.* v. *Chic*, (1905) 2 Ch. 123.

(*p*) *Bertie* v. *Lord Abingdon*, 3 Mer. 560, at p. 567. See *Penny* v. *Todd*, 26 W. R. 502.

(*q*) R. S. C., Ord. L. rr. 18, 19. For form of receivers' accounts, see R. S. C., App. L. No. 14.

(*r*) R. S. C., Ord. L. r. 20, and App. L. Form No. 22.

(*s*) *Hicks* v. *Hicks*, 3 Atk. 273.

(*t*) *Harrison* v. *Boydell*, 6 Sim. 211. See *Re Edwards*, 31 L. R. Ir. 242.

of the receiver and the appointment of another, and the payment of costs.

Mode of compelling delivery of accounts, &c.

An order may be made on a receiver to bring in accounts or pay balances on summons in a summary way (*u*), and such order may be enforced by attachment or by sequestration (*x*).

Accounts of deceased receiver.

The Court cannot summarily order the representatives of a deceased receiver to pass their testator's accounts (*y*). But, where the balance has been ascertained, an order may be made that his recognizance be put in force against his representatives and sureties (*z*).

Costs.

A receiver failing to bring in proper accounts may be made to pay the costs of an application for an order directing him so to do (*a*).

Liability for loss to estate.

A receiver was held to be liable for losses incurred by reason of the failure of a bank, in which he had deposited, to the joint account of himself and his sureties, moneys belonging to the estate (*b*); and he will generally be liable, if he has knowingly parted with the control of the moneys by placing them in the hands of other persons (*c*).

If a receiver receives moneys which he conceals from his accounts, and dies after his recognizances have been vacated, the debt is still a debt of record, and he is, besides, a trustee for the parties beneficially interested (*d*).

Claim against receiver.

The Court will not refuse liberty to try a right claimed against a receiver appointed in a foreclosure action, unless it is quite clear that the claim is unfounded (*e*).

Misapplication of rents, &c.

If a receiver, appointed by the Court on the application of an incumbrancer, misapply the rents and profits, the loss must ultimately fall on the mortgagor (*f*).

Liability on contracts.

Receivers and managers of a business appointed by the Court are not, by virtue of their appointment, agents of the company

(*u*) *Whitehead* v. *Lynes*, 34 Beav. 161. See R. S. C., Ord. XLI. r. 5.

(*x*) R. S. C., Ord. XLII. r. 7; *Re Bell's Estate*, L. R. 9 Eq. 172; *Sprunt* v. *Pugh*, 7 Ch. D. 567. See *Re Gent*, *Gent-Davis* v. *Harris*, 40 Ch. D. 190.

(*y*) *Jenkins* v. *Briant*, 7 Sim. 171; *Ludgater* v. *Channell*, 15 Sim. 479.

(*z*) *Ludgater* v. *Channell*, 3 Mac. & G. 175 (on appeal). See *Gurden* v. *Badcock*, 6 Beav. 157.

(*a*) *Bertie* v. *Lord Abingdon*, 8 Beav. 53.

(*b*) *Salway* v. *Salway*, 2 R. & My. 215; aff. 3 Cl. & F. 44. See *Deever* v. *Maudesley*, 8 Jur. 547.

(*c*) *Knight* v. *Lord Plymouth*, 3 Atk. 480.

(*d*) See *Seagram* v. *Tuck*, 18 Ch. D. 296.

(*e*) *Lane* v. *Capsey*, (1891) 3 Ch. 411.

(*f*) *Rigge* v. *Bowater*, 3 Bro. C. C. 365.

to make contracts on its behalf; if they enter into contracts with third persons for the supply of goods, &c., they will be personally liable on such contracts, unless there be in any particular contract a special stipulation to the contrary (*g*). They cannot annul contracts of the company (*h*).

Receiver must not make profit for himself.

A receiver will not be allowed to make interest for his own benefit of the moneys that come into his hands during the intervals between the passing of his accounts (*i*).

Similarly, a receiver will not be allowed to administer the estate so as to benefit the conduct of a business carried on by him on his own account (*k*).

Nor will he be allowed to purchase any part of the property of which he is receiver without the leave of the Court, even where the sale is made not in the action in which he was appointed, but by a mortgagee selling with leave outside the action (*l*).

Cesser of this rule after discharge.

But a receiver and manager of a business is not precluded after his discharge from setting up a similar business on his own account or from soliciting orders from the former customers of the business of which he was receiver and manager (*m*).

viii.—Remuneration and Expenses of Receiver.—By R. S. C., Ord. L. r. 16, a receiver shall, unless otherwise ordered, be allowed a proper salary or allowance. No direction as to salary is therefore now inserted in the order unless the receiver is to act without salary, in which case the words "without salary" should be inserted in the order (*n*). The amount of the salary or allowance will generally be fixed upon the passing of the first account (*o*); but under special circumstances the order may direct that the receiver shall be allowed such remuneration as the judge shall think proper on the passing of each account (*p*).

Measure of allowances.

The allowance made to a receiver depends upon the degree of facility or difficulty experienced in getting in the rents or

(*g*) *Burt* v. *Bull*, (1895) 1 Q. B. 276, C. A. See *De Grelle, Houdret & Co.* v. *Burt*, 1 Mans. 118.

(*h*) *Re Marriage, Neave & Co.*, (1896) 2 Ch. 663, C. A.

(*i*) *Shaw* v. *Rhodes*, 2 Russ. 539.

(*k*) *Alven* v. *Bond*, Fl. & K. 196.

(*l*) *Nugent* v. *Nugent*, (1908) 1 Ch. 546, C. A.

(*m*) *Re Irish, Irish* v. *Irish*, 40 Ch. D. 49.

(*n*) *Pilkington* v. *Baker*, 24 W. R. 234.

(*o*) Dan. Ch. Pr. (7th ed.) 1441.

(*p*) *Neave* v. *Douglas*, 26 L. J. Ch. 756.

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moneys receivable (*q*). There is no fixed scale of remuneration (*r*), each case being decided on its merits (*s*).

A party interested in the subject matter of the action proposing himself as receiver will generally be required to act without remuneration (*t*); but the rule is not inflexible, and the Court may allow it even though the order appointing a receiver is silent as to remuneration (*u*).

Extraordinary expenses.

A receiver will be entitled, in addition to his remuneration according to the scale fixed, to an allowance for extraordinary trouble and expenses (*x*), but such additional allowance should be previously sanctioned by the Court (*y*).

Where a receiver is appointed without salary, and has to give security, he will be allowed premiums paid by him to a guarantee society (*z*).

A receiver is not entitled to be reimbursed the expenses of journeys to or residence in a foreign country for the purpose of recovering property belonging to the estate, unless he has obtained the express sanction of the Court (*a*).

A receiver who is authorized to borrow money is entitled to his remuneration and expenses in priority to the lender's mortgage (*b*).

Costs of receiver out of receipts.

When a petition against a receiver, charging him with default, has been dismissed with costs, and the petitioner is unable to pay them, the receiver may, even as against incumbrancers on the property, retain the costs out of his receipts (*c*).

A receiver will be allowed to reimburse himself for all reasonable expenses incurred by him in getting in rents or moneys, including remuneration paid to a collector, even as against prior incumbrancers (*d*), without any previous application to the Court for that purpose (*e*), and notwithstanding the insufficiency of the estate to bear the costs of the mortgagee (*f*).

(*q*) *Day* v. *Croft*, 2 Beav. 488.
(*r*) *Prior* v. *Bagster*, W. N. (1887) 194; 57 L. T. 760.
(*s*) *Prior* v. *Bagster*, *sup.*
(*t*) See *ante*, p. 970.
(*u*) *Re Bignell*, (1892) 1 Ch. 59.
(*x*) *Potts* v. *Leighton*, 15 Ves. 276.
(*y*) *Re Ormsby*, 1 Ba. & Be. 189; *Harris* v. *Sleep*, *inf.*
(*z*) *Harris* v. *Sleep*, (1897) 2 Ch. 80.
(*a*) *Malcolm* v. *O'Callaghan*, 3 My. & Cr. 52.
(*b*) *Re Boynton*, (1910) 1 Ch. 519.
(*c*) *Courand* v. *Hanmer*, 9 Beav. 3. See *Re Dunn*, (1904) 1 Ch. 648; *Viola* v. *Anglo-American Co.*, (1912) 2 Ch. 305.
(*d*) *Gilbert* v. *Denely*, 3 Sc. N. R. 364.
(*e*) *Fitzgerald* v. *Fitzgerald*, 5 Ir. Eq. R. 525.
(*f*) *Batten* v. *Wedgwood Coal and Iron Co.*, 28 Ch. D. 317.

ix.—Discharge of Receiver.—When the objects for which a receiver has been appointed have been completed, so that his continuance is unnecessary, he will be discharged, and his recognizances will be vacated (*g*). Discharge.

An order for the discharge of a receiver on passing his final account and paying the balance certified to be due from him may be made after a decree for foreclosure absolute, without opening the foreclosure (*h*).

A receiver appointed on behalf of several mortgagees cannot be discharged without the consent of all (*i*). Several mortgagees.

The application to discharge the receiver may be made on motion, petition or summons, but is usually made by summons, which must be served on the receiver; but he ought not to appear unless under special circumstances, and, if he do so, his costs may be disallowed (*k*). How application for discharge should be made.

A receiver is liable to be discharged for irregularity in bringing or passing his accounts (*l*), or for other misconduct in the performance of his duties (*m*); or if his appointment was improper (*n*). Grounds for discharge.

If a receiver becomes bankrupt he will be removed, and a new receiver will be appointed in his place (*n*). Bankruptcy of receiver.

A first mortgagee who is ready to go into possession himself may obtain the discharge of a receiver who has been appointed at the instance of a puisne incumbrancer (*o*).

(*g*) *Tewart* v. *Lawson,* L. R. 18 Eq. 490. See R. S. C., Ord. LX. r. 4.

(*h*) *Arthy* v. *Stamford Bank,* W. N. (1886) 63. See *Holt* v. *Beagle,* 55 L. T. 592.

(*i*) *Faulkner* v. *Daniel,* 3 Ha. 204; *Bainbrigge* v. *Blair,* 3 Beav. 421.

(*k*) See *Herman* v. *Dunbar,* 23 Beav. 312; Dan. Ch. Pr. p. 1454.

(*l*) *Bertie* v. *Lord Abingdon,* 8 Beav. 53.

(*m*) *Mitchell* v. *Condy,* W. N. (1873) 232; *Re St. George's Estate,* 19 L. R. Ir. 566.

(*n*) *Re Lloyd, Allen* v. *Lloyd,* 12 Ch. D. 448, C. A.; *Niemann* v. *Niemann,* 43 Ch. D. 198, C. A.; *Re Wells, Moloney* v. *Brooke,* W. N. (1890) 104; *Re Maskelyne British Typewriter,* (1898) 1 Ch. 133.

(*o*) *Re Southern Rail. Co.,* 17 L. R. Ir. 121, 137.

CHAPTER XLVII.

OF ACTIONS ON PERSONAL COVENANTS FOR PAYMENT IN MORTGAGES (*a*).

Advantages of suing on covenant.

i.—Right of Action on Covenant generally.—The simplest remedy of a mortgagee to enforce the payment of his debt, and the one to which recourse should first be made where the security is scanty, is to bring an action against the mortgagor personally upon the covenant contained in the mortgage deed for payment of principal and interest. By bringing such an action, and obtaining judgment therein, the mortgagee will put himself in a position to recover the money due to him out of the property, real or personal, of the mortgagor, other than that comprised in the mortgage.

Summary relief.

If the mortgagee sues on the covenant for the debt, without claiming foreclosure, he may specially indorse his writ, under Ord. III. r. 6, and obtain summary judgment under Ord. XIV. r. 1 (*b*). It has been held that in the case of a transferee of a mortgagee so suing, the omission to aver that notice of the transfer was given to the mortgagor will not vitiate the special indorsement (*c*); but it certainly seems desirable that such an averment should be made (*d*).

Mortgagee may sue on covenant.

ii.—Who may sue on the Covenant.—Of course, the mortgagee himself may sue upon the covenant as soon as his right of action arises, and so long as any principal money or interest remains owing on the security of the mortgage.

Executors, administrators and

Upon the decease of a mortgagee of land, his executors, administrators, or assigns may sue upon the covenant, though

(*a*) The observations in this chapter will also apply to actions on bonds taken as collateral securities, and many of the cases cited relate to such actions; but collateral bonds have almost entirely fallen into disuse. As to claims for personal payment in foreclosure actions, see *post*, pp. 1054 *et seq.*

(*b*) *Imbert-Terry* v. *Carver*, 34 Ch. D. 506.

(*c*) *Satchwell* v. *Clarke*, 66 L. T. 641, C. A. See (1893) 1 Q. B. pp. 441, 442. The appointment of a receiver will not of itself prevent special indorsement. *Post*, p. 1055.

(*d*) See Ord. XIX. r. 14.

it is not expressly made with them, as the right to sue devolves on them without being mentioned (*e*).

assigns of deceased mortgagee.

Where the covenant is made with more persons than one who advance the money on a joint account, the right to sue devolves on the survivors or survivor of them, though the words "survivors or survivor" are not expressly mentioned in the covenant (*f*).

Executors or survivor of several joint mortgagees.

Transferee of mortgage.

A transfer of a mortgage, if properly drawn (*g*), contains an absolute assignment to the transferee of the mortgage debt, and the benefit of all securities for the same, as well as a conveyance to him of the mortgaged property. By virtue of such assignment, the assignee will be entitled to sue the mortgagor on his covenant for payment of principal and interest.

Right to sue for debt.

He may also now, by virtue of the assignment of the debt itself, sue for it in his own name, and will acquire the legal right to the debt, and to all legal and other remedies for the same, and the power to give a good discharge for the same, without the concurrence of the assignor, provided that notice of the assignment is given to the debtor, although the deed of transfer contains no power of attorney enabling him to sue (*h*).

Concurrence of mortgagor.

Frequently, however, the mortgagor is made a party to the deed of transfer, and covenants directly with the transferee for payment to him of principal and interest. By this means the transferee obtains a direct right of action against the mortgagor on the new covenant without any risk of a question being raised as to whether the latter has received due notice of assignment (*i*).

Sub-mortgage.

The enactment above referred to applies only to absolute assignments of debts and choses in action. Accordingly, a sub-mortgage of a mortgage debt and the securities for the same does not of itself confer on the sub-mortgagee any right of action against the original mortgagor except on the covenants by the latter for payment of principal and interest. No such action can be brought, except in the name of the original mortgagee or his absolute assignee; and if, by reason of there being no covenant for payment in the original mortgage, it is

(*e*) 44 & 45 Vict. c. 41, s. 58. See s. 30.

(*f*) 44 & 45 Vict. c. 41, s. 60.

(*g*) Dav. Conv. vol. ii. pt. 2, p. 781; cf. Key & Elph. (7th ed.) vol. ii. p. 212.

(*h*) See Jud. Act, 1873 (36 & 37 Vict. c. 66), s. 25, sub-s. (6).

(*i*) See further, as to assignments, *ante*, p. 844.

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intended that the sub-mortgagee shall be authorized to sue in the name of the original mortgagee, a power of attorney is still necessary for that purpose (*k*). A power of attorney given on an assignment by way of mortgage of a legal debt, being for valuable consideration, may be made irrevocable (*l*).

Principal and interest are distinct debts.

iii.—When and under what Conditions the Right of Action on the Covenant arises.—When a covenant in a mortgage deed stipulates for payment of principal and interest on a fixed day, they are distinct debts, and may be sued for separately when default is made in payment of either (*m*).

Action to recover interest.

The mortgagee's right of action on the covenant arises immediately upon the default of the mortgagor to perform the same. Thus, the mortgagee may bring his action for payment only of the interest due to him at any time after the mortgagor has failed to pay interest on any of the half-yearly or quarterly days appointed for payment of the same; or, if no such days are appointed, then it seems that the mortgagee may at any time claim the interest accrued due since the last payment (*n*).

Action to recover principal.

The accruer of the right of action on the covenant to pay the principal will depend upon the terms of the mortgage deed. In the ordinary case of a mortgage containing a covenant for payment of the principal, together with the interest then due, on a fixed day (usually six months after the date of the mortgage), an action on the covenant will lie immediately after default in payment on the day appointed; and it makes no difference whether the covenantor be principal or only a surety (*o*).

Alternative days of payment.

Where a loan is made for six or nine months, the option is in the borrower; and the credit of the borrower will not expire so as to enable the creditor to maintain an action for the debt until nine months have elapsed (*p*).

Principal payable on demand.

If the principal is made payable on demand, an action to recover it will lie at any time after the execution of the mortgage (*q*).

(*k*) See further, as to sub-mortgages, *ante*, p. 856.

(*l*) 45 & 46 Vict. c. 39, s. 8; but the section is not retrospective.

(*m*) *Dickenson* v. *Harrison*, 4 Pri. 282; *Attwood* v. *Taylor*, 1 Man. & Gr. 307.

(*n*) *Wilson* v. *Harman*, 2 Ves. Sen. 672.

(*o*) *Ante*, p. 95.

(*p*) *Reed* v. *Kilburn Co-operative Soc.*, L. R. 10 Q. B. 264.

(*q*) *Evans* v. *Jones*, 5 M. & W. 295. See *Barber* v. *Butcher*, 8 Q. B. 863.

Where there is a present debt and a promise to pay on demand, the demand is not considered to be a condition precedent to the bringing of the action; but where there is a covenant or promise to pay a collateral sum on demand, as, for instance, a covenant by a surety, then the demand must be made before action brought (*r*).

Where a mortgagor covenanted to pay on demand in writing to be left at the mortgaged premises, it was held sufficient to bring home to the mortgagor that the mortgagees were demanding their money and were about to take proceedings to recover it (*s*).

Principal payable on notice to pay.

Where, however, the covenant is not simply to pay "on demand," but to pay when the mortgagee should so "require by notice," or "upon demand in writing," the notice or demand given must not be illusory, but must allow the covenantor reasonable time to obtain the money (*t*).

So, also, if the mortgagee makes the demand through an agent or third person who alleges himself to be the agent of the mortgagee, the mortgagor will be entitled to a reasonable time for the purpose of ascertaining the authority of the alleged agent to receive the money and to give an effectual receipt for the same (*u*).

Action not notice.

Action brought is not notice where a debt is payable on notice (*x*).

Postponement of right to call in principal.

Where, as is sometimes the case, the mortgage deed contains a covenant by the mortgagee not to call in the money for a certain number of years, or before the happening of a specified event, as, for instance, the death of a named person, the mortgagee's right of action for recovery of the money will be suspended until the expiration of that period, subject, of course, to the strict performance by the mortgagor of the covenants or

(*r*) *Re Brown's Estate, Brown* v. *Brown*, (1893) 2 Ch. 300. See *Norton* v. *Ellam*, 2 M. & W. 461; *Jackson* v. *Ogg*, Johns. 397.

(*s*) *Worthington* v. *Abbott*, (1910) 1 Ch. 588.

(*t*) *Brighty* v. *Norton*, 3 B. & S. 305; *Toms* v. *Wilson*, 4 B. & S. 442; *Belding* v. *Read*, 3 H. & C. 955; *Exp. Trevor, Re Burghardt*, 1 Ch. D. 297. See also *Exp. Lamb, Re Southam*, 19 Ch. D. 169, C. A. This distinction appears to be fully borne out by the cases cited, and it is submitted that the dictum in *Fitzgerald's Trustee* v. *Mellersh*, (1892) 1 Ch. 385 at p. 390, as to payment on demand requiring reasonable notice, is too generally worded.

(*u*) *Moore* v. *Shelley*, 8 App. Cas. 285.

(*x*) *Moore* v. *Pechell*, 22 Beav. 172.

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conditions (if any) on his part upon the performance of which the mortgagee's covenant is made to depend (*y*).

Covenant deemed to be conditional on mortgagee's ability to reconvey.

iv.—Bar of Right of Action by Inability to Reconvey.—Although the covenant by the mortgagor for payment of principal and interest usually contained in a mortgage is in form absolute, it is nevertheless construed in equity as conditional upon the reconveyance by the mortgagee of the property mortgaged upon receipt by him of the full amount payable under the covenant (*z*). It follows that, although the mortgagee be entitled at law to sue upon the covenant, yet if it appear from the state of the transaction that, by the act of the mortgagee, other than an exercise of his power of sale, or other act authorized by the mortgagor, it has become impossible to restore the estate on payment of all that is due, the Court will interfere and prevent the mortgagee suing the mortgagor on his covenant; and accordingly, where a mortgagee had joined with the transferees of the equity of redemption in a partial alienation of the property, but the money was received by the transferees alone, the mortgagee was restrained from proceeding against the mortgagor upon his covenant to pay (*a*). So, where the mortgagee died leaving no heir, and his legal personal representatives sued at law for the mortgage debt, an injunction was granted to prevent the prosecution of the action, and the mortgage debt was ordered to be paid into Court and to remain there until the legal estate could be got in and conveyed to the mortgagor (*b*). And, in another case in which the title deeds had been lodged by the mortgagee with a solicitor, who claimed a lien upon them, the Court granted an injunction against proceedings at law to compel payment of the money, and ordered the money to be paid into the bank until the title deeds were recovered and a reconveyance could be made (*c*).

Acquiescence of mortgagor in alienation.

If, however, the mortgagor has given authority to the mortgagee to part with the mortgaged property, he cannot afterwards set up, as a defence to an action on the covenant, the

(*y*) *Brougham* v. *Squire*, 1 Drew. 151; *Leeds and Hanley Theatre* v. *Broadbent*, (1898) 1 Ch. 343, C. A. See *Burrowes* v. *Molloy*, 2 J. & L. 521, 527, *ante*, p. 958.

(*z*) *Kinnaird* v. *Trollope*, 39 Ch. D. 636.

(*a*) *Palmer* v. *Hendrie*, 27 Beav. 349. See *Tooke* v. *Hartley*, 2 Bro. C. C. 126; *Perry* v. *Barker*, 13 Ves. 198; *Lockhart* v. *Hardy*, 9 Beav. 355; *Walker* v. *Jones*, L. R. 1 P. C. 50.

(*b*) Case cited by Lord Redesdale, in *Schoole* v. *Sall*, 1 Sch. & L. 176.

(*c*) *Schoole* v. *Sall*, *sup.*

inability of the mortgagee to reconvey the property. Such authority may be derived from the mortgage deed, from an express power of sale contained therein (*d*), or from the statutory power of sale which is now incorporated into every mortgage deed, unless expressly excluded or modified; or it may be derived from the direct concurrence of the mortgagor, or possibly otherwise (*e*).

Loss by act of mortgagor.

Again, the inability of the mortgagee to reconvey will not bar his right of action on the covenant, or other remedies, if such inability arises from any default of the mortgagor. So, where a mortgagee of leaseholds has, after foreclosure of subsequent mortgagees, been ousted from the estate for breach of covenants, which the mortgagor's executors should have kept, the mortgagee may prove against the mortgagor's estate (*f*).

Liability of mortgagor and his personal representatives.

v.—Upon what Persons the Liability under the Covenant attaches.—The covenants to pay principal and interest are strictly personal covenants under which a personal liability attaches to the covenantor, and to his personal representatives after his death, although, as has been seen (*g*), as between his personal representatives and the mortgaged estate, the liability rests primarily on the latter.

Covenant by trustees.

Where trustees of a deceased mortgagor covenanted "as trustees but not so as to create any personal liability" to pay the mortgage debt and indemnify the estate of a deceased co-mortgagor, the covenant was held to be absolute and to involve the personal liability of the trustees (*h*).

Liability continues after assignment.

Accordingly the mortgagor will remain personally liable under his covenants, although he has absolutely parted with and conveyed to another person the equity of redemption. But, in such a case, the mortgagee will be entitled to judgment on the covenant only, on the terms that, upon receiving payment of the whole amount due from the mortgagor, he shall reconvey the property to the mortgagor, subject to the subsisting equity of redemption, thus, in effect, rendering the original mortgagor a mortgagee of the property (*i*).

(*d*) *Rudge* v. *Richens*, L. R. 8 C. P. 358.
(*e*) *Kinnaird* v. *Trollope*, 39 Ch. D. 636, 646.
(*f*) *Re Burrell*, *Burrell* v. *Smith*, L. R. 7 Eq. 399.
(*g*) *Ante*, p. 792.
(*h*) *Watling* v. *Lewis*, (1911) 1 Ch. 414; but see *Re Robinson*, (1912) 1 Ch. 717.
(*i*) *Kinnaird* v. *Trollope*, 39 Ch. D. 636.

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No liability attaches to assignee.

Conversely, these covenants do not run with the mortgaged property, so as to give the mortgagee a right to sue the assignee of the equity of redemption for principal and interest nor to prove in his bankruptcy for them, unless there is a covenant by the assignee rendering him personally liable for payment of the mortgage moneys or other special circumstances (*k*).

Liability of assignee to indemnify mortgagor.

Although the purchaser of an equity of redemption is not personally liable to the mortgagee on the covenant for payment, yet he is, independently of contract, liable to indemnify the vendor against the mortgage debt, and he may be required to give a covenant for such indemnity (*l*).

But this rule, it seems, only applies to an estate in possession, and does not apply where the subject-matter of the sale is a contingent reversionary interest or where there is an express limited indemnity (*m*).

Joint and several covenants.

Where a covenant is entered into by several persons, the question whether the liability thereby created is joint only (*n*), joint and several (*o*), or several only (*p*), will depend on the construction of the express terms of the covenant itself with reference to the deed as a whole; and such construction, in the case of ambiguity, may be explained by evidence of the interest of the covenantors in the property, or in the moneys advanced, or other circumstances of the transaction (*q*). Thus, though the covenant to pay is joint, the debt may still be treated as a several debt in respect of the money which each covenantor has received (*r*).

Misjoinder and non-joinder.

Formerly, if a covenantee brought an action upon a covenant, which was in its terms joint only, against one of several co-covenantors, the defendant could raise a plea in abatement which would have defeated the proceedings in that action (*s*). Pleas in abatement are now abolished, but by the Rules of the

(*k*) *Butter* v. *Butter*, 5 Ves. 534. See *Re Errington, Exp. Mason*, (1894) 1 Q. B. 11; *Thorne* v. *Cann*, (1895) A. C. 11, at p. 18.

(*l*) *Bridgman* v. *Daw*, 40 W. R. 453. And see (1901) 2 Ch. p. 623.

(*m*) *Mills* v. *United Counties Bank*, (1911) 1 Ch. 669; but see *S. C.*, (1912) 1 Ch. 231, *ante*, p. 789.

(*n*) See *Sumner* v. *Powell*, 2 Mer. 30; *Wilmer* v. *Curry*, 2 De G. & S. 347; *Kendall* v. *Hamilton*, 4 App. Ca. 504.

(*o*) *Robinson* v. *Walker*, 1 Salk. 393; *Enys* v. *Donnithorne*, 2 Burr. 1190; *May* v. *Woodward*, Freem. K. B. 248.

(*p*) *Armstrong* v. *Cahill*, 6 L. R. Ir. 440; *Exp. Harding*, 12 Ch. D. 557.

(*q*) See *Primrose* v. *Bromley*, 1 Atk. 89; *Beresford* v. *Browning*, 1 Ch. D. 30, C. A.

(*r*) See *Crossley* v. *Dobson*, 2 De G. & S. 486.

(*s*) 1 Chitty on Pleading (7th ed.), p. 462. See *Kendall* v. *Hamilton*, 4 App. Ca. 504, 529.

Supreme Court (*t*) it is provided that no cause or matter shall be defeated by reason of the misjoinder or nonjoinder of parties, and the Court may strike out or add parties on such terms as may be just.

The Judicature Act, 1873, empowered all Divisions of the High Court to give equitable relief (*u*), and enacted that in case of conflict or variance between the rules of law and of equity, the rules of equity shall prevail (*x*). But there never was any absolute rule in equity that a contract which would at law be construed as joint only, is to be treated in equity as joint and several (*y*). Where, therefore, under the present practice, one of several joint covenantors is alone sued on the covenant, he should apply to the Court, under Ord. XVI. r. 11, to enforce the joinder of the other co-covenantors, for it remains the substantial right of one joint contractor not to be sued without the other. But it is at his option whether he will raise any such defence or not (*z*).

If the covenantor who is being sued neglects to obtain an order for the joinder of his co-covenantors, the plaintiff may proceed with his action and obtain judgment against the defendant alone (*a*).

A judgment against one of two joint debtors is a bar to proceedings against the other (*b*), and this applies where judgment by consent has been obtained against one of them in an action against both (*c*).

The reader is referred to the Annual Practice for further cases under this rule.

Action on covenant against surety.

It has been seen that, where payment of the mortgage moneys is guaranteed by a surety, the mortgagee may, immediately on default, sue the surety independently of the principal debtor (*d*).

Action of covenant or debt.

An action of debt before the Judicature Act, 1873, lay by the mortgagee against a surety for the mortgagor on an absolute covenant to pay the mortgage debt; but if the covenant were collateral or conditional, an action on the

(*t*) R. S. C. Ord. XVI. r. 11; and see r. 6.
(*u*) 36 & 37 Vict. c. 66, s. 24.
(*x*) *Ibid.* s. 25, sub-s. 11.
(*y*) *Kendall* v. *Hamilton*, 4 App. Ca. 504.
(*z*) *Wegg-Prosser* v. *Evans*, (1895) 1 Q. B. 108, 118, C. A.
(*a*) *Wegg-Prosser* v. *Evans*, *sup.*
(*b*) *King* v. *Hoare*, 13 M. & W. 494; *Kendall* v. *Hamilton*, 4 App. Ca. 504.
(*c*) *McLeod* v. *Power*, (1898) 2 Ch. 295.
(*d*) *Ante*, p. 95.

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covenant was the best remedy (*e*). Where the declaration in an action of covenant stated the proviso for redemption on a certain day, and the covenant was in the usual form, to pay the mortgage debt "at the time thereinbefore appointed for the payment thereof," it was held to be a sufficient allegation of the time when the money was to be paid (*f*).

Judgment or award against principal no evidence against surety.

In the absence of special agreement, a judgment or award against a principal is no evidence against the surety (*g*). And when the mortgage deed contains a distinct covenant to pay the debt, the deed may be produced in evidence for the plaintiff (the mortgagee), without a schedule which is referred to in the deed as containing a list of the property mortgaged (*h*).

Upon the death of a mortgagor, not only are his executors or administrators liable, to the extent of his personal estate, to an action by the mortgagee on the covenant for payment of principal and interest, but the heirs and devisees of the mortgagor are similarly liable to the extent of his descended or devised real estate (*i*).

Common law liability of heir.

Under the old law, the real estate of debtors was not liable to their creditors.

The debtor might have devised his real estate for the payment of his debts; but if he devised it without any provision, or any effectual provision, for debts, or died intestate, the devisee or heir (unless bound by specialty) took the real estate free from the debts of the testator, or ancestor (*k*).

If the heir was bound by specialty, the creditor might have obtained judgment against him, to the value of assets descended, and have taken in execution the land of the ancestor, if not previously alienated or mortgaged by the heir.

Simple contract creditors, and creditors by specialty in which the heir was not bound, were wholly without remedy against him (*l*).

These evils have been remedied by successive statutes.

3 & 4 Will. & M. c. 14.

The Statute of Fraudulent Devises (*m*) introduced a just

(*e*) *Evans* v. *Jones*, 5 M. & W. 295.

(*f*) *Tildasley* v. *Stevenson*, 10 Bing. 545.

(*g*) *Exp. Young*, 17 Ch. D. 668, C. A.

(*h*) *Davies* v. *Heath*, 3 C. B. 938.

(*i*) But see now Land Transfer Act, 1897, *post*, p. 999.

(*k*) *Morley* v. *Morley*, 5 De G. M. & G. 610, 622; Williams on Real Assets, p. 4.

(*l*) Williams on Real Assets, p. 2.

(*m*) 3 & 4 W. & M. c. 24. See also 6 & 7 Will. III. c. 14; 4 Anne, c. 5 (Ireland); 47 Geo. III. c. 74.

principle for the relief of creditors, which has since been followed out to its full extent. By that statute, a right of action was given to the specialty creditor against the heir and devisee of his debtor jointly, in cases where no provision was made by the will for payment of debts. The remedy, however, did not apply to the case of a devisee and no heir, nor did it embrace simple contract creditors who, in case their fund was exhausted by the specialty creditors, were driven to their suit in equity to obtain a marshalling of assets.

Under this enactment it was held that, where a person covenants to pay a specific sum of money periodically, the covenantee was a specialty creditor on the real estates of the covenantor in the hands of his heir and devisee (*n*).

1 Will. IV. c. 47.

The statute 1 Will. IV. c. 47, repealing and consolidating the earlier statutes, provided for the cases of debts by covenant, where there was a devisee and no heir (*o*).

Devises in fraud of creditors void.

By this Act it was provided that devises of real estate should be void as against creditors by bonds, covenants, or other specialties binding the heir of the devisor (*p*); that such creditors might proceed by action upon the bond or covenant against the heir and devisee of the obligor or covenantor jointly (*q*), and that, if there should not be any heir-at-law against whom, jointly with the devisee, action could be brought, the creditor might bring his action on the bond or covenant against the devisee only (*r*).

Effect of sale by heir or devisee.

The Act further provides that in case any heir or devisee be liable to pay the debts or perform the covenants of his ancestor or testator and sell any land before action brought, the heir or devisee shall be liable in execution to the value of the lands so sold, saving that lands, *bonâ fide* aliened before the action brought, should not be liable to execution (*s*).

Right of action *v.* heir, &c. confined to specialty creditors.

It may be observed that the statutes above referred to give a right of personal action against the heir or devisee of a deceased debtor only to creditors whose debts are secured by bond, covenant, or other specialty binding the heirs; and that this limitation of the right is not affected by the statute 3 & 4 Will. IV. c. 104, whereby the realty of a deceased debtor is

(*n*) *Jackson* v. *Briant*, 6 Sim. 603.
(*o*) See *Hervey* v. *Audland*, 14 Sim. 531.
(*p*) 1 Will. IV. c. 47, s. 2.
(*q*) *Ibid.* s. 3.
(*r*) *Ibid.* s. 4.
(*s*) *Ibid.* ss. 6, 7, 8.

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made liable for his debts in an administration action. A creditor by specialty not binding the heirs, or by simple contract, has, under this statute, therefore, no right of action on the covenant, or simply of debt, as the case may be, against the heir or devisee, though he may bring such action against the executors or administrators of a deceased debtor to the extent of the personal assets. But as regards mortgages made since 1881, all contracts by specialty bind the heirs, though not expressly named (*t*).

Administration.

The right of a mortgagee to bring an action for the administration of the estate of a deceased mortgagor will be considered later (*u*).

Statutes create no charge on land.

The debts of the ancestor or testator are not by these statutes charged, or made liens, upon assets descended, or devised, but the heir or devisee is personally liable to the extent of such assets (*x*). The heir or devisee is liable to the extent of the real estate which he has received, but the real estate itself is not liable until a decree or judgment has been obtained (*y*).

Under the Debts Recovery Act, 1830, the liability of a devisee who alienates the land to the unpaid debts of his testator, is such as to render the debts his own debts to the extent of the value of the lands alienated (*z*).

Heir and devisee may sell or mortgage.

The heir or devisee may, before action, sell or mortgage for valuable consideration the freehold or copyhold assets, and make a good title to the purchaser or mortgagee, free from the debts (*a*); and the existence or notice of debts is immaterial, unless there be fraud, or want of *bona fides* (*b*); and the purchaser from a devisee is not entitled to have the will established against the heir, unless a case of suspicion arises (*c*). The heir, or devisee, is not a trustee for payment of debts; he is entitled to receive the rents and profits, until decree or judgment, but he is liable to account for what he has received (*d*).

Equitable alienation.

An equitable deposit, with a memorandum of charge, by the

(*t*) 44 & 45 Vict. c. 41, s. 59.
(*u*) *Post*, Chap. LII.
(*x*) *Spackman* v. *Timbrell*, 8 Sim. 253.
(*y*) *Re Moon*, (1907) 2 Ch. 304, explaining *Re Hyatt*, 38 Ch. D. 609.
(*z*) *Re Hedgely*, *Small* v. *Hedgely*, 34 Ch. D. 379; *Worthington* v. *Abbott*, (1910) 1 Ch. 588.
(*a*) *Higgins* v. *Shaw*, 2 Dr. & War. 356; *Haynes* v. *Forshaw*, 11 Ha. 93.
(*b*) *Stroughill* v. *Anstey*, 1 De G. M. & G. 635; *Richardson* v. *Horton*, 7 Beav. 112; *Storry* v. *Walsh*, 27 L. J. Ch. 338.
(*c*) *M'Culloch* v. *Gregory*, 3 K. & J. 12.
(*d*) *Shettleworth* v. *Neville*, 1 T. R. 454, 457; *Re Hyatt*, *Bowles* v. *Hyatt*, 38 Ch. D. 609, at p. 621. See *Re Moon*, *sup.*

heir or devisee is an alienation within the Debts Recovery Act, 1830 (*e*).

An equitable alienation will pass a good title no less than a legal alienation; and an equitable mortgagee from the heir or devisee will be protected against execution (*f*). The mortgagee of an equitable devisee for life is in the same position (*g*).

An equitable tenant for life is a "devisee" within the Act, and consequently a *bonâ fide* alienation by him before action brought will be protected (*h*).

Bankruptcy of heir.

The bankruptcy of the heir was not considered an alienation, and hence the creditors of the ancestor were held entitled to follow the real estates in the hands of the assignees in bankruptcy of the heir (*i*).

Conveyance in trust.

The conveyance by the devisees in trust to new trustees did not bar the creditor's right (*k*).

Settlement by heir.

The settlement of the real estate by the heir or devisee upon his marriage is an alienation discharging it from the debts of the ancestor, but leaving the heir personally liable for them (*l*). But an agreement for a settlement by an infant heir, never carried into effect, is not an alienation within the statutes (*m*).

Judgment *v.* heir not an alienation.

A judgment against the heir is not an alienation within the statutes; and now that, under the statute 3 & 4 Will. IV. c. 104, the land of a deceased person is assets for payment of his debts generally, the simple contract creditors of the ancestor will be preferred to the judgment creditors of the heir (*n*); but there is no lien or charge on the land until a judgment has been obtained by the creditors (*o*).

Land Transfer Act, 1897.

But now where the mortgagor dies since the Land Transfer Act, 1897, his legal personal representatives are liable on the covenant for the payment of principal and interest, not only to the extent of his personal estate, but to the extent of his real estate also.

(*e*) *British Mutual Investment Co.* v. *Smart*, L. R. 10 Ch. 567.
(*f*) *Coope* v. *Cresswell*, L. R. 2 Ch. 112.
(*g*) *Coope* v. *Cresswell*, *sup.*
(*h*) *Re Atkinson*, (1908) 2 Ch. 307.
(*i*) *Exp. Morton*, 5 Ves. 449.
(*k*) *Coope* v. *Cresswell*, L. R. 2 Ch. 112.
(*l*) *Spackman* v. *Timbrell*, 8 Sim. 253; *Richardson* v. *Horton*, 7 Beav. 112.
(*m*) *Pimm* v. *Insall*, 1 Mac. & G. 449.
(*n*) *Kinderley* v. *Jervis*, 22 Beav. 1.
(*o*) *Re Moon*, (1907) 2 Ch. 304.

CHAPTER XLVIII.

THE STATUTES OF LIMITATION IN BAR OF A MORTGAGEE'S RIGHT OF ACTION ON COVENANT OR DEBT.

SECTION I.

BAR OF MORTGAGEE'S RIGHT TO RECOVER THE PRINCIPAL.

Formerly no limit of time as to actions on covenant, &c.

i.—Actions on the Covenant to recover Principal Moneys charged on Land or Rents.—Prior to the passing of the Statute of Limitations (*a*), there was no limitation of time within which a mortgagee must have instituted an action of covenant, or on a collateral bond or other specialty, to recover money charged on land or rents.

Stat. 3 & 4 Will. IV. c. 27, s. 40.

By sect. 40 of the Act above referred to, all actions, suits, and other proceedings to recover money secured by mortgage, or otherwise charged on land or rent, must have been brought within twenty years after the right to receive the same first accrued, unless such right was kept alive by some payment or acknowledgment in writing.

Repeal and re-enactment.

This enactment is repealed by the Real Property Limitation Act, 1874 (*b*), but re-enacted, substituting twelve for twenty years as the period of limitation.

By the last-mentioned Act, it is enacted as follows:—

Money charged upon land, &c. to be deemed satisfied at the end of twelve years if no interest paid nor acknowledgment given in writing in the meantime (*c*).

Sect. 8. "No action or suit, or other proceeding, shall be brought to recover any sum of money secured by any mortgage, judgment, or lien, or otherwise charged upon or payable out of any land or rent, at law or in equity, or any legacy, but within *twelve* years next after a present right to receive the same shall have accrued to some person capable of giving a discharge for or release of the same, unless in the meantime some part of the principal money, or some interest thereon, shall have been paid, or some acknowledgment of the right thereto shall have been given in writing, signed by the person by whom the same shall be payable, or his agent, to

(*a*) 3 & 4 Will. IV. c. 27.
(*b*) 37 & 38 Vict. c. 57.
(*c*) For definitions of expressions "land," &c., for the purposes of these Acts, see *ante*, p. 771.

the person entitled thereto or his agent; and in such case no such action, or suit, or proceeding shall be brought, but within *twelve* years after such payment or acknowledgment, or the last of such payments or acknowledgments, if more than one, was given" (*d*).

Scope of this enactment.

This enactment is not applicable to actions to recover the land itself, but to actions brought to recover the money; and these actions, in the case of mortgages, are brought either upon the covenant inserted in the mortgage deed, or upon the bond which accompanies the deed (*e*), or, in the absence of any such covenant or bond, by action of debt.

A claim by a legal mortgagee for payment in an action for administration of the estate of the owner of the equity of redemption is within the section, and is not an action to recover land within sect. 1 (*f*).

A charge of debts on real estate by a testator has the effect of bringing the debts within sect. 8 so that as against the real estate the period of limitation is twelve years even after the Land Transfer Act, 1897 (*g*).

Charge on land.

Money secured by a bond by which the heir is bound is not money charged upon or payable out of land within the meaning of this section (*h*).

Actions not barred as against surety till after twenty years.

And it has been held that sect. 8 of the Act of 1874 does not bar, after twelve years, an action by a mortgagee of land against a surety who has given a *collateral* bond (*i*), for payment of the mortgage money; such an action is not a proceeding to recover money secured on land, but to recover damages because another person has failed to pay money secured on land. It seems, however, doubtful whether the same principle applies where the surety has entered into a covenant for payment in the mortgage deed itself (*k*).

Limitation of actions of debt on specialties, &c.

By the statute 3 & 4 Will. IV. c. 42, s. 3 (*l*), all actions of covenant or debt, upon any bond or other specialty, and all actions of debt or *scire facias* upon any recognizance, must

(*d*) *Hervey* v. *Wynn*, 22 T. L. R. 93.

(*e*) Per Littledale, J., in *Doe* v. *Williams*, 5 A. & E. 291, at p. 296. See *Re Conlan's Estate*, 29 L. R. Ir. 199.

(*f*) *Waters* v. *Lloyd*, (1911) 1 Ir. R. 153.

(*g*) *Re Balls*, (1909) 1 Ch. 791.

(*h*) *Roddam* v. *Morley*, 1 De G. & J. 1. See, further, as to the meaning of the words "charged on land" for the purposes of the Statutes of Limitation, *post*, p. 1022.

(*i*) *Re Powers, Lindsell* v. *Phillips*, 30 Ch. D. 291, C. A.

(*k*) *Re Frisby, Allison* v. *Frisby*, 43 Ch. D. 106, C. A.

(*l*) Extended to Ireland by 3 & 4 Vict. c. 105, s. 32.

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thereafter be commenced and sued within twenty years after the cause of action; with the saving of the infancy or other disability of either party existing at the time when the cause of action accrued (*m*).

But by sect. 5 of the same Act it is provided that:—

"'If any acknowledgment shall have been made, either by writing signed by the party liable by virtue of such specialty or recognizance, or his agent, or by part payment, or part satisfaction on account of any principal or interest being then due thereon;' then the action may be brought within twenty years after such acknowledgment, or if the person entitled to the action shall at the time of the acknowledgment be under disability, or the person making the acknowledgment shall be then beyond seas, then within twenty years after such party ceases from such disability, or returns from beyond seas" (*n*).

Plea of six years' limit bad.

To an action on the covenant, a plea that the cause of action did not accrue within six years before the commencement of the proceedings is bad (*o*).

Debt collaterally secured by promissory notes.

An action on the covenant will lie after six years, notwithstanding that the debt is to be paid by promissory notes of even date (*p*).

Action on covenants, &c. made in colony

An action in England is not barred, until the period prescribed by the Statute of Limitations has expired, though brought on a covenant or bond executed in a British colony or dependency, where the period of limitation for specialty debts is shorter than that allowed by English law (*q*).

Actions on covenant or bond barred after twelve years where money charged on land.

The Real Property Limitation Act, 1874 (*r*), did not refer to or in any way expressly alter the statute 3 & 4 Will. IV. c. 42. Prior to the passing of the Act of 1874, it was considered that the two Acts of Will. IV. (which were passed almost simultaneously) must be taken together, and that the latter Act must be deemed to be an explanation of the former, so that c. 27 related only to the land, and c. 42 to the personal remedy on the covenant or bond (*s*); and as the same period of limitation of the right of action was prescribed by both statutes, this ques-

(*m*) *Re Cornwall Ry. Co.*, (1897) 2 Ch. 74.

(*n*) The saving for absence beyond seas is now abolished: see *post*, p. 1019.

(*o*) *Hartshorne* v. *Watson*, 4 Bing. N. C. 178.

(*p*) *Dixon* v. *Holroyd*, 7 E. & B. 703.

(*q*) *Alliance Bank* v. *Carey*, 5 C. P. D. 429.

(*r*) 37 & 38 Vict. c. 57, s. 8.

(*s*) See per Lord Cottenham, in *Hunter* v. *Nockolds*, 1 Mac. & G. 640, at p. 652.

tion was not of any great practical importance. Now, however, the periods prescribed by the statutes 3 & 4 Will. IV. c. 42, and 37 & 38 Vict. c. 57, differ, the period of limitation under the former Act being twenty years, and under the latter Act twelve years. But it has been held in several cases (*t*), and may now be regarded as settled, that an action by a mortgagee of land on the covenant or bond given by the mortgagor as additional security for the debt, is an action for recovery of money charged on or payable out of land, and, accordingly, that the Act of 1874 has impliedly altered and controlled the operation of the statute 3 & 4 Will. IV. c. 42, s. 3, as regards mortgages of and charges on land, so that no action on a covenant in the security itself, or in a collateral bond given by the mortgagor, will lie after twelve years. And this is so, even though the subject matter of the mortgage is a reversionary estate in land directed to be sold, and though the reversion had not fallen into possession at the date of the action (*u*).

Surety.

It seems also that the Real Property Limitation Act, 1874, s. 8, applies not only to an action against the mortgagor, but also to an action against a surety on his covenant for payment of the mortgage debt (*x*).

Laches.

An action on the covenant or on a collateral bond may be brought at any time before the statutory period of twelve years has expired. There is no rule in equity, any more than at law, that the mere omission to sue a specialty debtor for any period within the statutory limit is laches, so as to deprive the creditor of his right of action (*y*).

Specialty debts secured on personalty recoverable within twenty years.

ii.—Actions on the Covenant to recover Principal Moneys charged on Personalty.—Sect. 3 of the statute 3 & 4 Will. IV. c. 42, still remains in full force as regards mortgages of personalty other than leaseholds, where the debt is secured by a covenant in the mortgage deed, or by a collateral bond, so as to enable mortgagees of such property to enforce their remedies, independently of their charge upon the property, by action on

(*t*) *Sutton* v. *Sutton*, 22 Ch. D. 511, C. A.; *Fearnside* v. *Flint*, 22 Ch. D. 579; *Re England, Steward* v. *E.*, (1895) 2 Ch. 820, C. A.; *Shaw* v. *Crompton*, (1910) 2 K. B. 370.

(*u*) *Kirkland* v. *Peatfield*, (1903) 1 K. B. 756.

(*x*) *Re Frisby, Allison* v. *F.*, 43 Ch. D. 106, C. A.; *ante*, p. 1001.

(*y*) *Re Baker, Collins* v. *Rhodes*, 20 Ch. D. 230, C. A.; *Three Towns Co.* v. *Maddever*, 27 Ch. D. 523; *post*, p. 1095.

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the covenant or bond, if brought at any time within *twenty* years after the cause of action has arisen (*z*).

Actions of debt, &c. must be brought within six years.

iii.—Actions of Debt to recover Principal Moneys.—The statutes above referred to limit the right of personal action in point of time, even in cases where the debt is secured by bond, covenant, or other specialty; but where the debt is not so secured, the creditor's remedy for recovering his debt by personal action, even when the debt is charged on land, depends on the statute 21 Jac. I. c. 16, s. 3, whereby all actions of account and upon the case (other than mercantile actions), and all actions of debt grounded upon any lending or contract without specialty, are to be sued or brought at any time within *six* years next after the cause of such actions, and not after; but by sect. 7 of the same Act it is provided that infants and other persons under disability may bring such personal actions within the several periods aforesaid after their disability ceases, or their return from beyond the seas (*a*). This Act was amended by Lord Tenterden's Act (*b*), which provided that the right of action might be kept alive by part payment or acknowledgment in writing.

A simple contract debt though secured by a charge on land is barred in six years (*c*).

Mortgages of land by deposit of deeds, &c.

Thus, in the case of a security on land by simple deposit of deeds, or of a mortgage deed not containing any covenant to secure payment, the mortgagee can only bring against the mortgagor personally an action for debt on simple contract, which latter action must be brought within six years after the cause of action has arisen, except in cases of disability, or unless the debt has been admitted by part payment or acknowledgment in writing (*d*). But though the personal remedy is barred, the remedy against the land continues (*e*). So where a person agrees to repay an advance by an instrument not under

(*z*) See *Mellersh* v. *Brown*, 45 Ch. D. 225; *Cornwall Rail. Co.*, (1897) 2 Ch. 74; *Charter* v. *Watson*, (1899) 1 Ch. 175.

(*a*) The saving for absence beyond seas is now abolished: see *post*, p. 1019.

(*b*) 9 Geo. IV. c. 14, s. 1, repealed as to Ireland by 16 & 17 Vict. c. 113, s. 3.

(*c*) *Barnes* v. *Glenton*, (1899) 1 Q. B. 885, C. A.

(*d*) *Ibid.* See *Hodges* v. *Croydon Canal Co.*, 3 Beav. 86, which was a case arising under sect. 42 of the stat. 3 & 4 Will. IV. c. 27 (as to arrears of interest), there being no covenant for personal payment.

(*e*) *London and Midland Bank* v. *Mitchell*, (1899) 2 Ch. 161.

seal and to execute a mortgage, an action for breach of contract to execute the mortgage is barred after six years (*f*).

Mortgages of personalty.

So, also, as regards mortgages of personalty other than leaseholds, not secured by covenant or bond, action of debt must be brought within six years after the cause of action first accrued (*g*).

Pleading.

Anyone who relies on the Statutes of Limitation as a defence to an action on the covenant, or of debt, ought to plead them. A residuary legatee has a right to plead the statutes against an old claim, though the executor refuse to interfere, and may enforce such right on an originating summons (*h*).

Privileges of ambassador.

iv.—Time from which the Statutes of Limitation begin to run.—The immunity of an ambassador from process in the Courts of this country prevents the Statutes of Limitation from running in his favour, not only so long as he is actually accredited to the sovereign, but for such reasonable time after his recall as is necessary for winding up his official business and making his preparations for leaving this country (*i*).

Time determined by terms of the instrument.

Where the payment of a mortgage debt is secured by a covenant in the mortgage deed or a collateral bond, the time when the statutory period will begin to run depends on the covenant or bond. And, for the determination of this question, the expressions "present right to receive" (*k*), and "cause of action" (*l*), would seem to be identical in effect so far as mortgages are concerned.

Where covenant is for payment on a fixed day.

Where the bond or covenant is in the usual form, that the mortgagor will pay the principal with interest on a fixed day (usually six months after the date of the deed), the "present right to receive" the money, or "cause of action" will first accrue on that day, and not on the day of the date or execution of the deed (*m*).

Postponement of right to call in mortgage moneys till distant date or given event.

If the covenant or bond is in terms for payment of the mortgage moneys on a distant date, or on the happening of a specified event, the statutory period will not begin to run till

(*f*) *Firth* v. *Slingsby*, 58 L. T. 483.

(*g*) *Barker's Claim*, (1894) 3 Ch. 290, C. A.

(*h*) *Re Wenham*, *Hunt* v. *Wenham*, (1892) 2 Ch. 59.

(*i*) *Musurus Bey* v. *Gadban*, (1894) 2 Q. B. 352, C. A.

(*k*) 37 & 38 Vict. c. 57, s. 8, *ante*, p. 1000.

(*l*) 21 Jac. I. c. 16, s. 3, *ante*, p. 1004; 3 & 4 Will. IV. c. 42, s. 3, *ant*, p. 1003.

(*m*) *Ante*, p. 990.

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that date or the happening of that event. So where a mortgage of a reversionary interest contained a covenant to pay the principal on the death of the tenant for life, the period was held to begin to run at the death (*n*).

Effect when postponement is conditional on payment of interest, &c.

Where, however, it is intended that the mortgagee's power to call in the money shall be postponed, and the mortgage deed, according to the usual practice in such cases (*o*), contains a covenant for payment six months after the date of the deed, with a proviso that the mortgagee shall not call in the money till a distant date, or the happening of a given event, so long as the interest is regularly paid and the mortgagor's covenants are duly performed and observed, then the right of action will first accrue on the arrival of the distant date or happening of the event specified, or on the earlier failure of the mortgagor to pay interest or perform his obligations under the mortgage deed (*p*). And accordingly the statutory period will begin to run from the earliest date when such right to bring an action arises (*q*).

Default in payment of instalment of principal.

So where a warrant of attorney was given to secure a debt, with a defeasance stating that the debt was to be repayable by instalments, but that in case default should be made in payment of any of the instalments, the creditor should be at liberty to enter up judgment and issue execution for all or so much of the debt as should be unpaid at the time, the same as if all the periods for payment had expired by effluxion of time, and in an action brought by the creditor, it appeared that the first default in payment of an instalment was made more than six years before the action; it was held that the creditor might have sued on the first default for the whole amount remaining unpaid, and that the statute began to run from that date so as to be a bar to the recovery of all the unpaid instalments (*r*).

Covenant to pay difference on realization of security.

So, also, where by a memorandum dated in 1882 of a deposit of bonds to secure the repayment in 1883 of an advance, which contained no express promise to pay at that time, the borrower authorized the lender, in the event of the loan remaining unpaid after it became due, to sell the bonds as he should think fit, and undertook to make good any deficiency on realization;

(*n*) *Re Turner's Estate, Turner* v. *Spencer*, 43 W. R. 153.
(*o*) *Ante*, p. 141.
(*p*) *Ante*, p. 990.
(*q*) See *Reeves* v. *Butcher*, (1891) 2 Q. B. 509, C. A.
(*r*) *Hemp* v. *Garland*, 4 Q. B. 519.

the lender sold the bonds in 1889 for a price insufficient to satisfy the debt; in 1891 the borrower died without having given any acknowledgment of the debt, and in 1894 a summons was taken out by the equitable mortgagee in an action for administration of the estate of the deceased debtor, claiming to be admitted to prove for the deficiency; it was held, under the statute of Jac. I., that a right of action accrued in 1883 on the implied promise to pay, which was not affected by the power of sale and undertaking to pay the deficiency, and that the claim of the lender to have the deficiency made good was accordingly statute-barred (*s*).

Where covenant by mortgagor is to pay "on demand."

Where by the terms of the mortgage deed there is a present debt, with a covenant to pay on demand, the demand is not considered to be a condition precedent to the bringing of the action; in such a case, therefore, the statute will begin to run as from the date of the instrument (*t*).

Like covenant by surety.

But the rule is otherwise with regard to a covenant by a surety for the mortgagor, in which case the demand must be made before the money can be considered as owing by the surety, and, until it is so owing, there can be no cause of action against him; so that the statute does not run till demand is made (*u*).

Cases on the enactments.

v.—Part Payment and Acknowledgment in Writing.—As to keeping alive the right of personal action for recovery of a mortgage debt by part payment, the decisions on cases falling within sect. 40 of the stat. 3 & 4 Will. IV. c. 27, or within sect. 8 of the stat. 37 & 38 Vict. c. 57, seem, generally speaking, to be equally applicable to cases falling within sect. 5 of the stat. 3 & 4 Will. IV. c. 42, and *vice versâ*.

A part payment to take a case out of the statute must be such a payment as implies an acknowledgment of liability and a promise to pay the residue, and therefore payment in bankruptcy proceedings is not sufficient (*x*).

By whom payment or acknowledgment is to be made.

None of the statutes specifies by whom part payment is to be made in order to keep alive the creditor's remedy on the

(*s*) *Re McHenry, McDermott* v. *Boyd, Barker's Claim*, (1894) 3 Ch. 290, C. A.

(*t*) *Norton* v. *Ellam*, 2 M. & W. 461, 464.

(*u*) *Re Brown's Estate, Brown* v. *Brown*, (1893) 2 Ch. 300. See as to contribution, *ante*, p. 105.

(*x*) *Taylor* v. *Hollard*, (1902) 1 K. B. 676.

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covenant or debt; but it is clear that payment by a person interested was intended (*y*). It has been held that, in the case of an action to recover money charged on land (which would include an action on a covenant or collateral bond to recover money so charged), the words in sect. 40 of the stat. 3 & 4 Will. IV. c. 27, "by the person by whom the same shall be payable or his agent," apply equally to the making of a payment and the signing of an acknowledgment (*z*).

Payment by a person bound to pay as between himself and the mortgagor is sufficient, and it need not be by a person bound as between himself and the mortgagee (*a*).

Payment by a stranger is not sufficient (*b*), but payment by some person concerned to answer the debt is (*c*).

Principal and surety.

Where a surety has given a covenant or bond for payment of the mortgage debt and interest, payment of interest by the mortgagor will keep alive the remedy of the mortgagee against the surety (*d*). And, conversely, payment by a surety will keep alive the remedy against the mortgagor (*e*).

Tenant for life and remainderman.

Payment by a tenant for life of interest on a mortgage debt of his settlor or testator is an acknowledgment made by the party liable by virtue of such specialty within the meaning of the stat. 3 & 4 Will. IV. c. 42, s. 5, so as to keep alive the right of action on the covenant of the settlor or testator against all persons interested in remainder (*f*).

The principle of *Roddam* v. *Morley* appears to rest upon the joint liability of a number of persons standing in equal peril of suit, and who all benefit by the discharge of all or any part of such liability (*g*).

The principle of *Roddam* v. *Morley* has been followed in many cases (*h*), and dissented from in two, *Dickinson* v.

(*y*) *Roddam* v. *Morley*, 1 De G. & J. 1, 18. See *Forsyth* v. *Bristowe*, 8 Exch. 716.

(*z*) *Chinnery* v. *Evans*, 11 H. L. C. 115, 128; *Harlock* v. *Ashberry*, 19 Ch. D. 539, C. A. Compare the judgment on the corresponding Canadian statute in *Lewin* v. *Wilson*, 11 App. Ca. 639, J. C.

(*a*) *Bradshaw* v. *Widdrington*, (1902) 2 Ch. 430, C. A.

(*b*) *Post*, p. 1009.

(*c*) *Lewin* v. *Wilson*, 11 A. C. 639.

(*d*) *Dowling* v. *Ford*, 11 M. & W. 329; *Re Frisby, Allison* v. *Frisby*, 43 Ch. D. 106, 111, C. A. See *Re Powers, Lindsell* v. *Phillips*, 30 Ch. D. 291, C. A. But see *Henton* v. *Paddison*, 68 L. T. 405.

(*e*) *Cann* v. *Taylor*, 1 F. & F. 651; *Seager* v. *Aston*, 3 Jur. N. S. 481.

(*f*) *Roddam* v. *Morley*, 1 De G. & J. 1; *Re Fitzmaurice's Minors*, 15 Ir. Ch. R. 545; *Pears* v. *Laing*, L. R. 12 Eq. 41; *Hollingshead* v. *Webster*, 37 Ch. D. 651; *Dibb* v. *Walker*, (1893) 2 Ch. 429.

(*g*) *Re Lacey*, (1907) 1 Ch. 330.

(*h*) *Pears* v. *Laing*, L. R. 12 Eq. 41; *Re Hollingshead*, 37 Ch. D. 657;

Teasdale (*i*) and *Coope* v. *Cresswell* (*k*); but in the former no reasons were given, and in the latter Lord Chelmsford said in effect that he was not overruling *Roddam* v. *Morley*.

The principle seems to be finally established by the Court of Appeal in *Re Lacey* (*l*), where it was held that payment of interest by the specific devisee of part of a testator's real estate which was subject to a mortgage created by the testator, is sufficient to keep the mortgagee's right of action alive against the specific devisees of other parts of the real estate which were not subject to the mortgage and thus entitle the mortgagee to an order for administration of the whole of the testator's real estate.

Dowress.

So, payment by a dowress was held to be sufficient (*m*).

Assignee of equity of redemption.

Payment of interest by an assignee of the equity of redemption was held to be payment by an agent of the mortgagor within the meaning of this section (*n*).

Owner of part of land charged.

Where several estates are originally comprised in one mortgage, and the several equities of redemption subsequently come into different hands, a part payment made, or an acknowledgment in writing duly signed and given by the owner of one estate, will prevent the statute from running, and keep the debt alive as against the owners of the other estates who have not made any payment or given any acknowledgment, even though such other owners be *bonâ fide* purchasers for value (*o*).

Part payment of annuity.

In the case of an annuity, the payment of the dividends on a sum of stock set apart to meet the annuity was held to be part payment (*p*).

Payment by stranger.

Payment of interest by a stranger will not prevent the statute from running (*q*).

Payments by receiver appointed by deed.

A receiver appointed by deed in the usual manner is the "agent" of the mortgagor for the purposes of the Statutes of Limitation, as generally for other purposes (*r*); and accord-

Dibb v. *Walker*, (1893) 2 Ch. 436; *Leahy* v. *De Moleyns*, (1896) 1 Ir. R. 206; *Re Chant*, (1905) 2 Ch. 225.

(*i*) 1 D. J. & S. 52.

(*k*) L. R. 2 Ch. 112.

(*l*) (1907) 1 Ch. 330. And see *Read* v. *Price*, (1909) 2 K. B. 724, C. A.

(*m*) *Ames* v. *Mannering*, 26 Beav. 583.

(*n*) *Forsyth* v. *Bristowe*, 8 Exch. 716.

(*o*) *Chinnery* v. *Evans*, 11 H. L. C. 115.

(*p*) *Re Ashwell's Trusts*, John. 112.

(*q*) *Chinnery* v. *Evans*, 11 H. L. C. 115, 128; *Newbould* v. *Smith*, 33 Ch. D. 127, C. A., affirmed on other grounds, 14 App. Ca. 423; *Bradshaw* v. *Widdrington*, (1902) 2 Ch. 430, C. A.

(*r*) See *ante*, p. 947.

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ingly, payment of interest by such receiver out of the rents and profits of the mortgaged estate is a sufficient acknowledgment by part payment to keep alive the debt (*s*).

Payment by receiver of part of estate.

Payment by a receiver in possession of part of the mortgaged estate will prevent the statute from running in favour of a purchaser of another part of the property (*t*).

Where receiver is appointed by the Court.

Payments by a receiver appointed by the Court, if made pursuant to an order of the Court, will keep alive the mortgagee's remedies (*u*). But where a receiver in a suit made payments, without the sanction of the Court, on account of a debt secured by covenant, it was held that the payments did not take the claim out of the statute as against the covenanting debtor or his estate (*x*).

The appointment by the Court of a receiver of the estate of an infant was held not to prevent the operation of the Statute of Limitations in favour of such infant as against a stranger to the suit, although found by the master to be an incumbrancer on the estate (*y*). But such an appointment would apparently prevent the statute from running in favour of a stranger against the suitor (*z*).

Receipt of rent by mortgagee.

In a case under Lord Tenterden's Act (*a*), it was said that if a mortgagee enters into possession and receives the rents, such possession is *primâ facie* to be taken as payment of interest or principal, as the case may be, thus preventing the statute from running so as to bar the personal remedy for the debt (*b*). But this was a mere dictum which has been expressly overruled, and it is now settled that the receipt of rents by a mortgagee is not a payment by the mortgagor, or by anyone on his behalf, so as to prevent the debt from being barred (*c*).

Payment by tenant to mortgagee on notice.

So, under the statute 7 Will. IV. & 1 Vict. c. 28 (*d*), a payment of rent by a tenant of mortgaged property to the mortgagee, in consequence of a notice by the mortgagee to pay the

(*s*) *Re Lord Muskerry*, 9 Ir. Ch. R. 94.

(*t*) *Chinnery* v. *Evans*, 11 H. L. C. 115; and see *Brew* v. *Brew* (1899), 2 Ir. R. 163, as to payment by sheriff of part of a judgment debt.

(*u*) *Ibid.*

(*x*) *Whitley* v. *Lowe*, 2 De G. & J. 704.

(*y*) *Harrison* v. *Duignan*, 2 Dr. & War. 295; *Hunt* v. *Bateman*, 10 Ir. Eq. 377.

(*z*) *Wrixon* v. *Vize*, 3 Dr. & War. 104; *Dixon* v. *Gayfere*, 17 Beav. 421; *Hill* v. *Stawell*, 2 Ir. L. R. 302; which, however, were cases of actions for recovery of land.

(*a*) 9 Geo. IV. c. 14.

(*b*) *Brocklehurst* v. *Jessop*, 7 Sim. 438. See *Fordham* v. *Wallis*, 10 Ha. 217, 228.

(*c*) *Cockburn* v. *Edwards*, 18 Ch. D. 449, 457, C. A.

(*d*) See *post*, Chap. L. (iv).

rent to him, is not a payment by the mortgagor or his agent so as to prevent the statute from running (*e*).

Effect on collateral securities.

It has been held that the receipt of rents by a mortgagee will keep alive a collateral bond or judgment debt by which the mortgage is collaterally secured (*f*). But this proposition seems open to question.

Payment by co-contractor or co-debtor.

By the old law, payment of interest by one of several joint contractors took the case out of the statute as to the rest of the co-contractors and their representatives, though made more than six years after the debt became due (*g*). But this is now altered.

No co-contractor to lose benefit of statute by payment by other co-contractor.

The Mercantile Law Amendment Act (*h*) declares, with reference to sect. 3 of 3 & 4 Will. IV. c. 42, and other Acts, that when there shall be two or more co-contractors or co-debtors, whether bound or liable jointly only, or jointly and severally, or executors or administrators of any contractor, no such co-contractor or co-debtor, executor, or administrator, shall lose the benefit of the said enactments or any of them, so as to be chargeable in respect or by reason only of payment of any principal, interest, or other money by any other or others of such co-contractors or co-debtors, executors, or administrators.

Acknowledgment by one of two mortgagors.

The Act does not apply to a personal action brought to recover money secured by a mortgage of land; and therefore payment of interest by one of two mortgagors prevents the statute from running in favour of the other mortgagor (*i*).

But an acknowledgment by one of two executors and trustees that more than six years' interest is due upon a mortgage does not prevent the statute running as regards the real estate, though, *semble*, it would be effectual in the case of a claim against the personal assets (*k*).

The Act is intended only to give protection against the common creditor, and does not affect the rights and liabilities of the co-debtors *inter se* (*l*).

(*e*) *Harlock* v. *Ashberry*, 19 Ch. D. 539, C. A.

(*f*) *Dowling* v. *Ford*, 11 M. & W. 329. But see *White* v. *Hillacre*, 3 Y. & C. Ex. 607. And see Sug. R. P. St. 128; and cases cited there.

(*g*) *Channell* v. *Ditchburn*, 5 M. & W. 494; *Goddard* v. *Ingram*, 3 G. & D. 46.

(*h*) 19 & 20 Vict. c. 97, s. 14.

(*i*) *Bailie* v. *Irwin*, (1897) 2 Ir. R. 614.

(*k*) *Astbury* v. *Astbury*, (1898) 2 Ch. 111.

(*l*) *Gardner* v. *Brooke*, (1897) 2 Ir. R. 6, C. A.

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It is said that this Act does not apply to co-contractors in the relation of principal and surety (*m*).

Whether this enactment applies to sureties.

Nor does the Act apply when the payment, though made by one co-debtor, was made by him for and on behalf of another co-debtor at his request (*n*).

Payment on behalf of co-debtor.

The section is not retrospective as regards the date of the payment (*o*).

Payment on eve of bankruptcy.

The fact that part payment is made by a debtor shortly before his bankruptcy with the object of renewing a statute-barred debt, will not prevent the creditor from proving in the bankruptcy in respect thereof, even though the money paid may be recoverable from the creditor on the ground of fraudulent preference (*p*).

Mortgagor and mortgagee the same.

The statute never runs where there is the same hand to pay and the same hand to receive (*q*). Where a tenant for life had paid off a charge on the estate so that he was entitled to the charge for his own benefit, it was held that the statute did not run during his life, though he had done nothing to keep the charge alive; the statute could not be applied where there was no person to pay the charge, and no person who, by the delay, could be led to suppose that the charge was abandoned or merged, and where the rent out of which the interest out of the charge ought to have been paid, was receivable by and belongs to the same person who was entitled to the interest (*r*).

Devisee in fee being also tenant for life of money charged.

But in order to prevent the statute from running, the person in receipt of the rents and profits of the land charged, and also entitled to receive the interest on the charge, must be a person liable to pay the interest. So where a testator had covenanted with trustees for payment of a sum of money with interest, to be held in trust for his son for life, with remainders over, and had charged the same on certain lands, and devised the lands so charged to his son in fee, and the money was never raised and no interest was ever paid; it was held that the son not being liable to pay the interest on the charge, the claim against the testator's estate under the covenant was statute-barred (*s*).

(*m*) *Seager* v. *Aston*, 26 L. J. Ch. 302. But see *Cockrill* v. *Sparks*, 1 H. & C. 699.

(*n*) *Re Tucker*, *Tucker* v. *Tucker*, (1894) 3 Ch. 429, C. A.

(*o*) *Jackson* v. *Woolley*, 8 E. & B. 778.

(*p*) *Re Lane*, *Exp. Gaze*, 23 Q. B. D. 74.

(*q*) Per Lord St. Leonards, in *Burrowes* v. *Gore*, 6 H. L. C. 907, at p. 963; *Re Dixon*, *inf.*

(*r*) *Topham* v. *Booth*, 35 Ch. D. 607. See *Burrell* v. *Earl of Egremont*, 7 Beav. 205.

(*s*) *Re England*, *Steward* v. *England*, (1895) 2 Ch. 820, C. A.

So, where a husband borrowed trust funds, to the income of which his wife was entitled, on mortgage of lands belonging to him, and for more than twenty years, during which the husband and wife lived together in amity, he paid no interest to her nor to the trustee-mortgagee; it was held that, under the circumstances, the conclusion in law was that the husband was authorized by his wife to retain the interest and apply it for their joint use, and that in effect there was the same hand to pay and to receive, so that the statute was prevented from running (*t*).

Husband and wife.

Under the stat. 21 Jac. I. c. 16, which did not provide for acknowledgment by part payment, a payment out of personal estate would not keep alive a debt against realty, which was also liable to pay it (*u*).

Upon the same principle it was held that payment of interest by the devisee of the mortgagor, or receipt of rent by a creditor in his character of incumbrancer on the real estate, ought not to preserve the debt against the debtor's personalty (*x*). But the circumstances in that case were somewhat special.

Under sect. 40 of the stat. 3 & 4 Will. IV. c. 27 (as re-enacted by sect. 8 of the Real Property Limitation Act, 1874 (*y*)), an acknowledgment (unless made by part payment) must "in the meantime" be given in writing, signed by the person by whom the money shall be payable, or his agent, to the person entitled, or his agent (*z*).

Acknowledgment under s. 40.

Sect. 42 of the same Act, which will be considered later (*a*), provides that no arrears of interest shall be recovered extending over more than six years next after the same has become due, "or next after an acknowledgment of the same in writing shall have been given to the person entitled thereto, or his agent, signed by the person by whom the same was payable or his agent."

Acknowledgment under s. 42.

It is to be observed that the former enactment does, and the latter does not, prescribe that the acknowledgment must be given "in the meantime." A payment made more than twelve years after the cause of action first accrued, but less than twelve

Distinction between enactments as to statute-barred debts.

(*t*) *Re Hawes, Burchell* v. *Hawes*, 62 L. J. Ch. 463; *Re Dixon, Heynes* v. *D.*, (1900) 2 Ch. 561, C. A.

(*u*) *Putnam* v. *Bates*, 3 Russ. 188. See *Astbury* v. *Astbury*, (1898) 2 Ch. 111.

(*x*) *Fordham* v. *Wallis*, 10 Ha. 217; *Astbury* v. *Astbury*, *sup.*

(*y*) 37 & 38 Vict. c. 57.

(*z*) *Waters* v. *Lloyd*, (1911) 1 Ir. R. 153.

(*a*) *Post*, p. 1020.

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years before action brought, is a payment "in the meantime," which will prevent the right of action being barred (*b*).

It would seem that an acknowledgment given at any time as to arrears of interest in respect of money charged on land will entitle the mortgagee to claim the amount of arrears admitted, provided he brings his action within six years after the acknowledgment.

In *Bolding* v. *Lane* (*c*), where the mortgagor gave an acknowledgment as to arrears more than six years after the first failure to pay interest, Lord Westbury, C., incidentally said that if there had been no second mortgagee the acknowledgment would have let in all arrears.

As the requirements of these two sections with regard to acknowledgment are in other respects virtually identical, decisions under one of these sections on the various points which have arisen as to acknowledgments are equally applicable to the other section; it will therefore be convenient in this place to consider the effect of these enactments together.

Acknowledgment by agent.

The words "by the person by whom the same shall be payable or his agent" include any person who, as between himself and the mortgagor, is bound to pay the interest. A man can be an agent not only when he acts for a principal properly so called, but also when he makes the payment on behalf of the debtor because he has bound himself so to do (*d*).

It is clearly settled that an agent need not be authorized in writing (*e*). The agency may be inferred from the circumstances of the case (*f*). Where the solicitor of the defendants wrote a letter acknowledging their right to the money claimed, an inquiry was directed whether the solicitor, when he wrote the letter, was the agent of the defendants (*g*).

In the case of a mortgage of land and a policy, the payment by the office issuing the policy, of the surrender value to the mortgagee is not a payment by the agent of the person liable to pay (*h*).

Ratification.

Where a person purports to act as an agent for another, a

(*b*) *Re Clifden, Annaly* v. *Agar-Ellis,* (1900) 1 Ch. 774; *Harty* v. *Davis,* 13 Ir. L. R. 23; *contra, Gregson* v. *Hindley,* 10 Jur. 383.

(*c*) 1 De G. J. & S. 122, at p. 128, cited *infra,* p. 1016.

(*d*) *Bradshaw* v. *Widdrington,* (1902) 2 Ch. 430, C. A.

(*e*) *Coles* v. *Trecothick,* 9 Ves. 250.

(*f*) See *Trulock* v. *Robey,* 12 Sim. 407; *Thorne* v. *Heard,* (1895) 1 A. C. 495.

(*g*) *Toft* v. *Stevenson,* 1 De G. M. & G. 28.

(*h*) *Re Clifden, sup.*

subsequent ratification by the latter is as effectual as if the agent had been originally specifically appointed for the purposes of the Act (*i*).

Report as to incumbrances does not bind person not party to suit.

The report of a master on a reference as to incumbrances, finding that a charge was established, was held not to be a sufficient acknowledgment under sect. 40, as the master was in no sense the agent of the debtor so as to bar a secured creditor who was not a party to the suit (*k*).

Admission in answer.

An admission in an answer or affidavit by a person entitled who is a party to the suit is sufficient (*l*).

Acknowledgment by trustee or executor.

The acknowledgment will be sufficient if it be made by a trustee of the estate, whether he be a devisee in trust (*m*) of the debtor, or a trustee appointed by the Court (*n*), just as the acknowledgment of an executor will keep alive a debt against all parties beneficially interested. And an acknowledgment by one of several executors is sufficient (*o*). But an acknowledgment by one devisee does not apparently prevent his co-devisee from pleading the statute (*p*).

Acknowledgment by person in double character.

Where an acknowledgment is made by a person who fills a double character, as that of executor and beneficial devisee of the debtor, it is a general acknowledgment, and will not be applied to one character more than to the other, and the interest of the person making it as beneficial devisee will be affected no less than his interest as executor (*q*); but if he be executor of one debtor, and be also a debtor individually in respect of the same debt, an act done by him which he was bound to do in his individual character, and which amounts to an acknowledgment, will not be *primâ facie* considered to have been done as executor (*r*). He fills the place of two persons, and the question is by whom the promise was made, and not what is the extent or effect of it.

Where money which ought to have been applied to the payment of debts has been wrongfully paid over to residuary

(*i*) *James* v. *Bright*, 5 Bing. 533; *Foster* v. *Bates*, 12 M. & W. 233. As to the nature and extent of the authority of an agent, see *Pole* v. *Leask*, 28 Beav. 562; affirmed in D. P., 9 Jur. N. S. 829.

(*k*) *Hill* v. *Stawell*, 2 Ir. L. R. 302.

(*l*) *Blair* v. *Nugent*, 3 J. & L. 677.

(*m*) *St. John* v. *Boughton*, 9 Sim. 219.

(*n*) *Toft* v. *Stevenson*, 1 De G. M. & G. 28.

(*o*) *Re Macdonald, Dick* v. *Fraser*, (1897) 2 Ch. 181.

(*p*) *Dickenson* v. *Teasdale*, 1 De G. J. & S. 52. See *ante*, p. 1008.

(*q*) *Fordham* v. *Wallis*, 10 Hare, 217.

(*r*) *Way* v. *Basset*, 5 Hare, 55.

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legatees, but the debts have been kept alive against the executors, the residuary legatees cannot set up the statute in bar to a claim by the creditors for the refunding of the moneys thus paid (*s*).

Acknowledgment by mortgagor does not preclude puisne mortgagee from relying on statute.

Under sect. 42, it has been held that an acknowledgment by a mortgagor of more than six years' interest being due does not preclude a puisne mortgagee from relying on the statute. Where, therefore, a mortgagor was, but a second mortgagee was not, a party to a transfer of the first mortgage, the interest on which was, as recited in the transfer, upwards of six years in arrear, it was held that the second mortgagee was, notwithstanding the recital, entitled to redeem the first mortgagee on payment of principal and six years' arrears of interest only (*t*). The acknowledgment is confined to the interest of the person giving the acknowledgment (*u*).

To whom acknowledgment under s. 5 is to be made.

Sect. 5 of the stat. 3 & 4 Will. IV. c. 42 does not require the payment or acknowledgment to be made to the person entitled, or to amount to a promise to pay; therefore an admission of a bond debt, contained in an answer of the executors of the obligor, in a suit to which the obligee was not a party, was held to be sufficient to take the bond debt out of the operation of the statute (*x*). So, a recital in a deed executed by the mortgagor, but to which the mortgagee was not a party, was held to be a sufficient acknowledgment within this section (*y*). But where a mortgagor by deed conveyed the mortgaged estate with other property to trustees, upon trust to pay off all mortgages and incumbrances affecting his property, it was held that this was not a sufficient acknowledgment as regarded a particular mortgage (*z*).

Acknowledgment of statute-barred debt.

Sect. 5 does not say that acknowledgment is to be given before the debt becomes statute-barred, and, if this enactment stood alone, it seems clear that an acknowledgment given after the expiration of the statutory limit would revive the debt, and the right to bring a personal action for its recovery. And such appears to be still the case with regard to debts not charged on land or rent (*a*).

(*s*) *Fordham* v. *Wallis*, *sup.*

(*t*) *Bolding* v. *Lane*, 1 De G. J. & S. 122. See *Astbury* v. *Astbury*, (1898) 2 Ch. 111.

(*u*) *Chinnery* v. *Evans*, 11 H. L. C. 115, at p. 135.

(*x*) *Moodie* v. *Bannister*, 4 Drew. 433.

(*y*) *Forsyth* v. *Bristowe*, 8 Exch. 716.

(*z*) *Howcutt* v. *Bonser*, 3 Exch. 491.

(*a*) See *Re Lane, Exp. Gaze*, 23 Q. B. D. 74.

To a plea of the statute upon a mortgage deed the plaintiff, in order to take the case out of the statute by acknowledgment in writing under sect. 5, must reply such acknowledgment, and that action was brought within the statutory period (*b*).

Acknowledgment must be pleaded.

Acknowledgment by part payment may be proved by any evidence admissible according to the ordinary rules; and after the death of a person alleged to have made such payments the fact may be proved by indorsements on the deed or bond of such payments made while the statutory time was running (*c*). And it would seem that, if such indorsements are undated, the time at which the payments were actually made may be proved *aliunde* (*d*).

Proof of acknowledgment.

Parol evidence is admissible to prove the contents of a written acknowledgment which has been lost (*e*).

Payment of part of a sum secured by a covenant or bond is not necessarily an acknowledgment that the whole amount claimed is due (*f*).

To whom acknowledgment must be given under sects. 40 and 42.

It is to be observed that an acknowledgment under these sections must be given to the person entitled or his agent, and that an acknowledgment given to a third person, such as would be sufficient under sect. 5 of the stat. 3 & 4 Will. IV. c. 42 (*g*), will not be sufficient to keep alive a mortgagee's right to recover money charged on land or arrears of interest (*h*). The requirements of sects. 40 and 42 in this respect have, however, been liberally construed. The acknowledgment may be made in an affidavit, schedule, or answer, although in those cases it may be said that it is made to the Court and not to the party (*i*).

But a debt set out in the schedule of debts of a testator's estate in the Inland Revenue affidavit for probate by the executors is not an acknowledgment (*k*).

Acknowledgment must be to person

With the exception referred to, it is settled that the person to whom an acknowledgment is made must be one who is in a

(*b*) *Kempe* v. *Gibbons*, 9 Q. B. 609.

(*c*) *Searle* v. *Lord Barrington*, 2 Stra. 826; *Gleadow* v. *Atkin*, 1 Cr. & M. 410. Sect. 3 of Lord Tenterden's Act (9 Geo. IV. c. 14) does not apply to specialty debts.

(*d*) *Briggs* v. *Wilson*, 5 De G. M. & G. 20. See *Glyn* v. *Bank of England*, 2 Ves. Sen. 38; *Gale* v. *Capern*, 1 A. & E. 102; *Smith* v. *Battens*, 1 Moo. & R. 841.

(*e*) *Read* v. *Price*, (1909) 2 K. B. 724, where the onus of proof is discussed.

(*f*) *Ashlin* v. *Lee*, 44 L. J. Ch. 376.

(*g*) See *ante*, p. 1002.

(*h*) *Grenfell* v. *Girdlestone*, 2 Y. & C. Ex. 676.

(*i*) *Blair* v. *Nugent*, 3 J. & L. 658, 673, 677; Carson, R. P. Stat. 199.

(*k*) *Re Beavan*, (1912) 1 Ch. 196.

entitled to demand payment.

position to demand payment of the money (*l*). So, the sufficiency of an acknowledgment given to the solicitor of a widower, before letters of administration to the wife's estate had been granted, was doubted by Knight-Bruce, V.-C., but it was not necessary to decide the point (*m*).

What acknowledgment is sufficient.

In order to amount to a sufficient acknowledgment, the party must use language which clearly admits his own liability to pay the debt (*n*). So, a letter written by one of two executors to the plaintiff was held not to be a sufficient acknowledgment, because it was written, not with a view of making himself liable, but in order to throw the burden of payment on his co-executor (*o*). A letter or series of letters admitting the debt, expressly or by necessary inference, will be sufficient. So, a direction in a will as to payment of a debt of the testator was held to be a good acknowledgment (*p*); and a written proposal of terms for payment of a judgment debt, with an expression of hope that such terms would be acceptable, was held to be a sufficient acknowledgment of the debt (*q*).

But mere passive acquiescence by the debtor in a statement as to the debt made by the creditor will not be a sufficient acknowledgment. So, where a mortgagee sent an account of the debt to the mortgagor, showing appropriation, towards payment of the debt, of certain moneys which were in the mortgagee's control, and the mortgagor did not object to the account or appropriation, it was held that there was no acknowledgment (*r*).

An acknowledgment need not state the amount of the debt alleged to be due (*s*), which may be proved by parol evidence (*t*). So, where a mortgagee of harbour works and tolls wrote to complain of non-payment of interest on a mortgage, and received in reply a letter stating that the non-payment of interest was owing to expenses incurred by the mortgagor in connection with the mortgaged undertaking, this was held to

(*l*) *Grenfell* v. *Girdlestone*, 2 Y. & C. Ex. 676.
(*m*) *Holland* v. *Clark*, 1 Y. & C. C. C. 151.
(*n*) *Grenfell* v. *Girdlestone*, *sup.*
(*o*) *Holland* v. *Clark*, *sup.*
(*p*) *Millington* v. *Thompson*, 3 Ir. Ch. R. 236.
(*q*) *Vincent* v. *Willington*, 1 Long. & Town, 456.
(*r*) *Re McHenry*, *McDermott* v. *Boyd*, *Barker's Claim*, (1894) 3 Ch. 290, C. A.
(*s*) *Cheslyn* v. *Dalby*, 2 Y. & C. Ex. 170, 188, 190; 4 Y. & C. Ex. 238. See *Hales* v. *Stevenson*, 9 Jur. N. S. 301; *Jortin* v. *South Eastern Rail. Co.*, 6 De G. M. & G. 270.
(*t*) *Cheslyn* v. *Dalby*, *sup.*; *Dugdale* v. *Vize*, 5 Ir. L. R. 568; *Hanan* v. *Power*, 8 Ir. L. R. 505.

be a sufficient acknowledgment, both as to principal and interest (*u*).

vi.—Disabilities.—The provisions of sect. 4 of the stat. 3 & 4 Will. IV. c. 42, with regard to preserving rights of action during disabilities, appear to be to the same effect as the provisions of sect. 16 of the stat. 3 & 4 Will. IV. c. 27, which will be considered later in dealing with the bar of actions for foreclosure (*x*). 3 & 4 Will. IV. c. 42, s. 4.

Neither the stat. 3 & 4 Will. IV. c. 27, nor the Real Property Limitation Act, 1874 (*y*), contains any provision preserving the right of action, in cases falling within sect. 40 and sect. 8 of those respective Acts, where the person entitled to demand payment of money charged on land is an infant, or under any other disability. But it is clear that an infant or person of unsound mind is not competent to give a discharge for the money, and it has been held that, in the case of an infant, the statute begins to run so as to bar the right of action under sect. 40 from the time when the person entitled to bring such action attains twenty-one years (*z*). Coverture is no longer a disability in cases falling within the Married Women's Property Act, 1882 (*a*). 3 & 4 Will. IV. c. 27, and 37 & 38 Vict. c. 57.

By sect. 10 of the Mercantile Law Amendment Act (*b*), absence beyond seas when the cause of action arises no longer entitles the plaintiff, in an action of covenant or debt, to an extension of the statutory period within which he must bring his action. Absence beyond seas.

But the stat. 21 Jac. I. c. 16 does not begin to run in favour of a defendant to an action of debt so long as he is beyond seas; for, by the stat. 4 & 5 Anne, c. 3, s. 19, such action may be brought against him within six years after his return from beyond seas; and it makes no difference that the action is one in which the writ or notice of the writ might, by leave of the Court, have been served out of the jurisdiction under R. S. C. Ord. XII. (*c*).

(*u*) *Jortin* v. *South Eastern Rail. Co.*, 6 De G. M. & G. 270.
(*x*) See *post*, Chap. L. (vii).
(*y*) 37 & 38 Vict. c. 57.
(*z*) *Piggott* v. *Jefferson*, 12 Sim. 26.
(*a*) 45 & 46 Vict. c. 75.
(*b*) 19 & 20 Vict. c. 97.
(*c*) *Musurus Bey* v. *Gadban*, (1894) 2 Q. B. 352, C. A.

Chap. XLVIII. § 2 (i.)

Section II.

Bar of Mortgagee's Right to Arrears of Interest.

i.—What Arrears of Interest are recoverable in Actions of Covenant or Debt.—By 3 & 4 Will. IV. c. 27, s. 42, it is enacted that:—

No arrears of rent or interest to be recovered for more than six years.

"No arrears of rent or of interest in respect of any sum of money charged upon or payable out of any land or rent, or in respect of any legacy, or any damages in respect of any such arrears of rent or interest, shall be recovered by any distress, action, or suit, but within *six* years next after the same respectively shall have become due, or next after an acknowledgment of the same in writing shall have been given to the person entitled thereto, or his agent, signed by the person by whom the same was payable, or his agent: Provided nevertheless, that where any prior mortgagee or other incumbrancer shall have been in possession of any land, or in the receipt of the profits thereof, within one year next before an action or suit shall be brought by any person entitled to a subsequent mortgage or other incumbrance on the same land, the person entitled to such subsequent mortgage or incumbrance may recover in such action or suit the arrears of interest which shall have become due during the whole time that such prior mortgagee or incumbrancer was in such possession or receipt as aforesaid, although such time may have exceeded the said term of six years" (*d*).

Limitation of right of action on covenant, &c.

It has been seen (*e*) that sect. 3 of the stat. 3 & 4 Will. IV. c. 42, enacts that actions of covenant or upon specialty debts must be brought within *twenty* years after the cause of action, which period is now reduced to *twelve* years in the case of such actions brought to recover moneys charged on land, with a saving proviso in case of acknowledgment in writing or by part payment.

Apparent discrepancy between the two enactments.

Questions arose as to the apparent conflict between the two statutes of Will. IV., which were passed almost simultaneously, and in several cases the Courts were of opinion that they are to be reconciled by treating sect. 3 of c. 42 as an exception out of the operation of the former Act (*f*). The result of the decisions

(*d*) As to what arrears of interest are recoverable by a mortgagee on taking the accounts in actions of foreclosure and redemption, see *post*, Chap. LIV.

(*e*) *Ante*, pp. 1002 *et seq.*

(*f*) *Paget* v. *Foley*, 2 Bing. N. C. 679; *Strachan* v. *Thomas*, 12 A. & E. 556; *Manning* v. *Phelps*, 24 L. J. Ex. 62; *Homfrey* v. *Gery*, 7 C. B. 567.

would appear to be to establish that the remedy against the land under the former statute (c. 27) was not extended by reference to the personal remedy under the latter (c. 42); nor, on the other hand, was the personal remedy abridged by reference to that against the land. So, in *Du Vigier* v. *Lee* (*g*), it was held that a mortgagee of land, whose debt was also secured by a covenant in the mortgage and by a collateral bond, was entitled in a foreclosure suit to recover twenty years' arrears of interest. But this decision was overruled by Lord Cottenham, C., in *Hunter* v. *Nockolds* (*h*), where his lordship said that the only mode of reconciling the two enactments in accordance with the presumable intentions of the legislature was to treat the effect of the conjoined enactments as being that no more than six years' arrears of rent or interest, in respect of any sum charged upon, or payable out of, any land or rent, shall be recovered by any distress, action, or suit, except in actions upon covenant or debt in specialty, in which cases the limitation shall be twenty years.

Thus, though the mortgagee could only recover six years' arrears against the land mortgaged under the stat. 3 & 4 Will. IV. c. 27, s. 42, yet in an action of covenant he could formerly have recovered twenty years' interest under the stat. 3 & 4 Will. IV. c. 42, s. 3.

What arrears of interest can now be recovered in action on the covenant where debt charged on land.

The period within which actions may be brought for the recovery of money charged on or payable out of land or rent has now been reduced to twelve years (*i*), and, as has been seen, this limit applies to actions on the covenant in respect of such moneys (*k*). The result would appear to be (applying the principle of *Hunter* v. *Nockolds* (*l*)), that a mortgagee to whom more than six years' arrears of interest are owing on a mortgage, containing the usual covenant for payment, is on the footing of a secured creditor in respect of the principal and six years' arrears, and of a specialty creditor in respect of the remainder of any arrears which have accrued due at any

(*g*) 2 Ha. 326.

(*h*) 1 Mac. & G. 640. See also *Shaw* v. *Johnson*, 1 Dr. & S. 412; *Sinclair* v. *Jackson*, 17 Beav. 405; *Round* v. *Bell*, 30 Beav. 121; *Re Lloyd, Lloyd* v. *Lloyd*, (1903) 1 Ch. 385, C. A.

(*i*) See 37 & 38 Vict. c. 57, s. 8.

(*k*) See *ante*, p. 1003.

(*l*) 1 Mac. & G. 640. See *Darley* v. *Tennant*, 53 L. T. 257, in which case it was held that arrears of rent reserved by a lease could be recovered in an action on the covenant to pay rent for the full period limited for bringing such action, notwithstanding sect. 8 of the Real Property Limitation Act, 1874, inasmuch as that section applies only to actions for the recovery of moneys charged on or payable out of land, and not to rent reserved by a lease.

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time during the twelve years last past; and that such arrears are accordingly recoverable in an action on the covenant against a mortgagor. It is not, however, at all clear that the principle of *Hunter* v. *Nockolds* applies. That decision has been explained as being due to the fact that the two enactments in question were passed within three weeks of one another (*m*). And in an Irish case (*n*), Porter, M.R., treated the decision in *Sutton* v. *Sutton* as getting rid of the anomalous results of the decision of *Hunter* v. *Nockolds*. On the other hand, the Court of Appeal in a recent case (*o*) referred to *Hunter* v. *Nockolds* without explanation or disapproval. The question, therefore, seems to be still an open one.

If the mortgagee has no covenant for payment, he is merely a simple contract creditor, and cannot recover arrears of interest beyond six years (*p*).

Arrears recoverable in action on covenant where debt charged on personalty.

As the Real Property Limitation Act, 1874, applies (so far as it relates to mortgages) only to the recovery of moneys charged on or payable out of land or rents, it would seem that a mortgagee of personalty other than leaseholds may still, in an action on the covenant, recover arrears of interest extending over *twenty* years.

Annuity deed not collaterally secured by covenant.

An annuity charged on land, but not collaterally secured by a personal covenant for payment thereof, is within sect. 42 of the stat. 3 & 4 Will. IV. c. 27 (an annuity so charged being included in the definition of "rent" for the purposes of the Act (*q*)), so as to bar the annuitant from recovering more than six years' arrears (*r*).

Sum payable by instalments.

A sum charged on land and payable by yearly instalments is within the section (*s*).

Mortgage of reversionary interest in proceeds of sale of land.

A mortgage of a reversionary interest in the proceeds of lands devised upon trust for sale is a mortgage of a sum of money "payable out of land" within the meaning of sect. 42. So where a married woman, entitled after the death of a tenant for life to a share of a fund arising from the proceeds of sale of land so devised, mortgaged the same by deed acknowledged, containing a covenant to pay full interest; the covenant was

(*m*) *Sutton* v. *Sutton*, 22 Ch. D. 511, per Cotton, L.J. And see 43 Ch. D. 110.

(*n*) *Re Nugent's Trusts*, 19 L. R. Ir. 147.

(*o*) *Re Lloyd*, *Lloyd* v. *Lloyd*, (1903) 1 Ch. 385.

(*p*) *Hodges* v. *Croydon Canal Co.*, 3 Beav. 86; *Barnes* v. *Glenton*, (1899) 1 Q. B. 585, C. A.

(*q*) *Ante*, p. 771.

(*r*) *Francis* v. *Grover*, 5 Ha. 39; *Re Ashwell's Trusts*, John. 112.

(*s*) *Uppington* v. *Tarrant*, 12 Ir. Ch. R. 262.

rejected as being the covenant of a married woman, and it was held that the mortgagee could claim no more than six years' interest (*t*).

Mortgage of reversionary interest in personalty.

But a mortgage of a reversionary interest in a fund representing residuary personal estate of a testator, though wholly or partially invested on mortgage of real estate, is not a sum of money payable out of land, and accordingly sect. 42 does not apply, and there is no limit to the arrears of interest recoverable (*u*).

Mortgage of tolls, &c.

It has been held, that money lent on the security of turnpike tolls was not charged on land within the meaning of sect. 42, and accordingly that the mortgagees were entitled, in a suit for the recovery of arrears of interest, to recover the whole amount of the arrears extending over more than six years last past (*x*). But a mortgage by a canal company of the canal and works with the rates was held to be a charge on land within the Act (*y*).

Mortgage of land abroad.

Where there is a charge on real estate situate in a colony in which 3 & 4 Will. IV. c. 27 is not in force, arrears of interest are recoverable for more than six years, even though the question has arisen in a suit in England (*z*).

Statutory liability of company.

Where a railway company issued debentures under its special Act, and gave to the holders certificates and also interest warrants signed by its secretary; it was held that the liability of the company being statutory the period of limitation was twenty years (*a*).

Acknowledgment must be in writing.

ii.—Acknowledgment.—Sect. 42 does not recognize acknowledgment by part payment, but requires that an acknowledgment must be in writing, given to the party entitled to the interest, or his agent, and signed by the person by whom the same was payable, or his agent, in order to oust the operation of the section. The requirements of this section are in this respect precisely similar in effect to the requirements of sect. 40,

(*t*) *Bowyer* v. *Woodman*, L. R. 3 Eq. 313. See *Re Lloyd*, (1903) 1 Ch. 385, C. A.; *Kirkland* v. *Peatfield*, (1903) 1 K. B. 756.

(*u*) *Smith* v. *Hill*, 9 Ch. D. 143; *Clarkson* v. *Henderson*, 14 Ch. D. 348; *Mellersh* v. *Brown*, 45 Ch. D. 225.

(*x*) *Mellish* v. *Brooks*, 3 Beav. 22.

(*y*) *Hodges* v. *Croydon Canal Co.*, 3 Beav. 86.

(*z*) *Pitt* v. *Lord Dacre*, 3 Ch. D. 295. See *Sutton* v. *Sutton*, W. N. (1883) 88.

(*a*) *Re Cornwall Minerals Rail. Co.*, (1897) 2 Ch. 74. And see (1904) 1 Ch. 796.

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and reference is made to an earlier part of this chapter, where this subject is fully considered (*b*).

iii.—Express Trusts.—As a general rule, sect. 42 of the stat. 3 & 4 Will. IV. c. 27 was not applicable where the relation of trustee and *cestui que trust* was established between the parties (*c*), as falling within sect. 25 (*d*). However, where the beneficiary had allowed a very long time to elapse without attempting to enforce the trust, the Court restricted the interest to six years, on the principle of the statute (*e*).

And now, even in the case of express trusts, only six years' interest is recoverable on money or legacies charged on land or rent (*f*).

Puisne incumbrancers not deprived of protection by agreement as to priority of his charge.

iv.—Protection of Puisne Incumbrancers.—With regard to the proviso at the end of sect. 42, protecting a puisne incumbrancer from being damaged by the entry into possession by a prior incumbrancer, it has been held that a puisne incumbrancer will not be deprived of the benefit of the clause by an agreement between himself and the prior incumbrancer in possession that the security of the latter shall be postponed to his own charge, so long as the prior incumbrancer remains in possession of the land (*g*).

Effect of this proviso.

The proviso does not extend to give to a puisne incumbrancer arrears of interest for six years previous to the commencement of the prior incumbrancer's possession; but it entitles him to all arrears during the continuance of the possession, though such possession may have commenced more than six years before action brought to recover the arrears (*h*).

Under the proviso, the assignment to a trustee for the purchaser of an estate of outstanding terms affecting it, and of judgments on which *elegits* had been issued, does not constitute the purchaser an "incumbrancer," so as to prevent the operation of the statute on a claim of the mortgagee (*i*).

v.—Disabilities.—Disabilities by reason of infancy, &c. are not in any way provided for by sect. 42 of the stat. 3 & 4 Will. IV. c. 27 (*k*).

(*b*) *Sup.* pp. 1007 *et seq.*
(*c*) *Gough* v. *Bult*, 16 Sim. 45.
(*d*) See *post*, Chap. L. (ix).
(*e*) *Thomson* v. *Eastwood*, 2 App. Ca. 215.
(*f*) 37 & 38 Vict. c. 57, s. 10. See *post*, Chap. L. (ix).
(*g*) *Drought* v. *Jones*, 2 Ir. Eq. R. 303.
(*h*) *Montgomery* v. *Southwell*, 2 Con. & L. 263.
(*i*) *Chinnery* v. *Evans*, 11 H. L. C. 115.
(*k*) See *De Beauvoir* v. *Owen*, 5 Exch. 182.

CHAPTER XLIX.

FORECLOSURE AND SALE BY ORDER OF THE COURT.

SECTION I.

THE RIGHT TO FORECLOSE GENERALLY, AND THE NECESSARY PARTIES TO AN ACTION FOR FORECLOSURE.

Equitable doctrine as to mortgages.

1.—Who may foreclose a Mortgage.—It has already been seen that in equity the repayment of the debt is regarded as the primary object of every mortgage transaction, and that the mortgaged property is merely incidental by way of security for such repayment, and, accordingly, that the mortgagor, notwithstanding his breach of condition, and the consequent forfeiture at law of his estate, shall be relieved on payment of principal, interest, and costs, and that a mortgagee in possession shall be accountable for rents and profits (*a*).

Mortgagee may foreclose.

It is an obvious corollary from this doctrine that it would be unjust that a mortgagee in possession should be subject to a perpetual account or converted into a perpetual bailiff. And, accordingly, it is well settled that after a fair and reasonable time given to the mortgagor to discharge the debt, he shall lose, or, in other words, be foreclosed his equity of redemption, so that the mortgagee's possession will be converted into an absolute ownership as against the mortgagor and all persons claiming under him. There is an exception in the case of a Welsh mortgage, where the mortgagee cannot compel redemption, nor enforce foreclosure (*b*).

Mortgagee not in possession.

A mortgagee cannot be compelled to take possession, for he would thereby subject himself to the account which the Court will never force on a mortgagee; therefore, he may bring his action for foreclosure without taking possession (*c*).

(*a*) *Ante*, p. 12.
(*b*) 1 Ves. Sen. 401, 406; *ante*, Chap. III.
(*c*) *Lord Penrhyn* v. *Hughes*, 5 Ves. 99, 106.

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Mortgagee of copyholds.

A mortgagee of copyholds, though not in possession, may bring his action for foreclosure before admittance (*d*).

Proprietor of registered charge.

The registered proprietor of a charge registered under the Land Transfer Act, 1875 (*e*), is on the same footing as an ordinary legal mortgagee as regards his right to enforce his security by foreclosure; and on obtaining an order for foreclosure absolute, the mortgagee can apply to be registered as proprietor of the land (*f*).

Foreclosure not affected by power of sale.

A power of sale, whether express (*g*) or by virtue of the statute (*h*), does not affect the right of the mortgagee to foreclose.

Equitable mortgagee.

A mortgagee of an equity of redemption (*i*), and an equitable mortgagee, whose security is an agreement for a legal mortgage (*k*), may foreclose. The proper remedy of an equitable mortgagee of a share in a partnership is foreclosure (*l*).

Mortgagee by deposit.

It is now settled, after some difference of opinion, that an equitable mortgagee by deposit of deeds, with or without a memorandum, is entitled to foreclose (*m*). Where there is a deposit of title deeds, the Court, for the purpose of enforcing the mortgagee's remedies, treats that as an agreement to execute a legal mortgage, and therefore as carrying with it all the incidents to such a mortgage (*n*).

Judgment creditor.

It seems that a judgment creditor has the same right as an equitable mortgagee to foreclosure (*o*).

Mere charge or lien.

In the case of a mere charge or lien, the proper remedy is sale, not foreclosure (*p*).

Charging order.

So the remedy of a person who has obtained a charging order on shares under sect. 14 of 1 & 2 Vict. c. 110, is not foreclosure but sale (*q*). But the deposit of a certificate of shares

(*d*) *Sutton* v. *Stone*, 2 Atk. 101.

(*e*) 38 & 39 Vict. c. 87, s. 26, set out *ante*, p. 47.

(*f*) Rule 164; *ante*, p. 47.

(*g*) *Wayne* v. *Hanham*, 9 Ha. 62; *Perry* v. *Keane*, 6 L. J. Ch. 67.

(*h*) See 44 & 45 Vict. c. 41, s. 21 (5).

(*i*) *Richards* v. *Cooper*, 5 Beav. 304.

(*k*) *Frail* v. *Ellis*, 16 Beav. 350; *Moore* v. *Perry*, 1 Jur. N. S. 126.

(*l*) *Redmayne* v. *Foster*, L. R. 2 Eq. 467.

(*m*) *James* v. *James*, L. R. 16 Eq. 153, and cases there cited; *Backhouse* v. *Charlton*, 8 Ch. D. 444; *York Union Banking Co.* v. *Artley*, 11 Ch. D. 205.

(*n*) *Carter* v. *Wake*, 4 Ch. D. 605. As to copyholds, see *Pryce* v. *Bury*, 2 Drew. 11, 41; *S. C.*, L. R. 16 Eq. 153, n.

(*o*) *Messer* v. *Boyle*, 21 Beav. 559; *Beckett* v. *Buckley*, L. R. 17 Eq. 435. But see *Wells* v. *Kilpin*, L. R. 18 Eq. 298; and Land Charges Act, 1900.

(*p*) *Tennant* v. *Trenchard*, L. R. 4 Ch. 537, 542.

(*q*) *D'Auvergne* v. *Cooper*, W. N. (1899) 256.

by way of security entitles the depositee to foreclosure (*r*) or sale (*s*).

Co-mortgagees.

One of several joint mortgagees may foreclose though the others dissent; but the latter should be made defendants, and the judgment will be for the benefit of all (*t*).

Where loan is by several mortgagees of distinct sums.

But where money is advanced by several persons who are entitled thereto in distinct shares, one of such persons cannot foreclose an aliquot part of the estate (*u*). Where a mortgage is made to two persons to secure a loan made by them in distinct portions, one of the co-mortgagees may bring his action for foreclosure, making the other mortgagee a defendant, and is entitled to the usual decree of foreclosure on default in payment of the whole mortgage debt in the proportions due to the plaintiff and the defendant mortgagee respectively, together with their respective costs (*x*).

Trustee-mortgagees.

Where moneys advanced on mortgage form part of a trust estate, the trustee-mortgagees are entitled to foreclosure like any other mortgagee. But if a trustee lends his own moneys to a *cestui que trust* on the security of a charge on the trust property, he will not be allowed to foreclose on the ground that foreclosure would produce a conflict between his interest as mortgagee and the interest of the trust estate and of the persons beneficially entitled thereto (*y*).

Duty of trustees as to foreclosed land.

If trustee-mortgagees foreclose, they will hold the foreclosed property upon trusts corresponding to the trusts of the moneys advanced, and the trustees will have a power of sale over the land, and will be able to give to a purchaser a good title and valid receipts for the purchase-money (*z*).

The Conveyancing Act, 1911 (*a*), provides as follows:—

Sect. 9. "(1.) Where any property, vested in trustees by way of security, becomes, by virtue of the statutes of limitation, or of an order for foreclosure or otherwise, discharged from the right of redemption, it shall be held by them on trust for sale, with power to postpone such sale for such a period as they may think proper.

(*r*) *Harrold* v. *Plenty*, (1901) 2 Ch. 314.

(*s*) *Stubbs* v. *Slater*, (1910) 1 Ch. 632.

(*t*) *Luke* v. *South Kensington Hotel Co.*, 11 Ch. D. 121, C. A.

(*u*) *Palmer* v. *Earl of Carlisle*, 1 S. & St. 423. See *Remer* v. *Stokes*, 4 W. R. 730.

(*x*) *Davenport* v. *James*, 7 Ha. 249.

(*y*) *Tennant* v. *Trenchard*, L. R. 4 Ch. 537, and cases cited *ibid.* at p. 541.

(*z*) *Tait* v. *Lathbury*, L. R. 1 Eq. 174. See *Master* v. *De Croismar*, 11 Beav. 184.

(*a*) 1 & 2 Geo. V. c. 37, s. 9.

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"(2.) The net proceeds of sale, after payment of costs and expenses, shall be applied in like manner as the mortgage debt, if received, would have been applicable, and the income of the property until sale shall be applied in like manner as the interest, if received, would have been applicable; but this sub-section shall operate without prejudice to any rule of law relating to the apportionment of capital and income between tenant for life and remainderman.

"(3.) This section shall not affect the right of any person to require that, instead of a sale, the property shall be conveyed to him or in accordance with his directions.

"(4.) Where the mortgage money is capital money for the purposes of the Settled Land Acts, 1882 to 1890, the trustees shall, if the tenant for life, or person having the powers of a tenant for life, so requires, instead of selling any land forming the whole or part of such property, make such conveyance or execute such declaration of trust of the same as may be required for giving effect to the directions contained in sect. 24 of the Settled Land Act, 1882 (as amended by any subsequent enactment), and as if the land had been acquired by purchase as mentioned in that section.

"(5.) This section applies to property the right of redemption whereof is discharged before as well as after the commencement of this Act."

Cestui que trust.

Where a mortgage is vested in trustees, the *cestui que trust*, or one of several *cestuis que trust*, may maintain an action for foreclosure of the entire mortgaged estate (*b*).

There can be no foreclosure or redemption where the transaction is not a mortgage, but an absolute sale, with power for the vendor to repurchase (*c*).

Distinction where trust deed and not mortgage.

A trust to pay a sum of money advanced out of rents and profits is not strictly a mortgage (*d*). So, if the estate be conveyed to the mortgagee in trust that the same shall stand charged with the mortgage debt and interest, with power of sale, the mortgagee is not entitled to foreclosure (*e*). But the Court will presume an instrument intended as a security to be an ordinary mortgage unless the terms exclude such construction (*f*). Securities by way of trust are construed strictly; but, if the terms of the instrument will permit, and if the

(*b*) *Lowe* v. *Morgan*, 1 Bro. C. C. 368; *Wood* v. *Williams*, 4 Madd. 186.

(*c*) *Goodman* v. *Grierson*, 2 Ba. & Be. 278; *Alderson* v. *White*, 2 De G. & J. 97; *Ogden* v. *Battams*, 1 Jur. N. S. 791; *Williams* v. *Owen*, 5 My. & Cr. 303; *Perry* v. *Meadowcroft*, 4 Beav. 202. See further as to such sales, *ante*, pp. 23 *et seq.*

(*d*) *Balfe* v. *Lord*, 2 Dr. & War. 480; *Taylor* v. *Emerson*, 4 Dr. & War. 117.

(*e*) *Sampson* v. *Pattison*, 1 Ha. 533; *Jenkin* v. *Row*, 5 De G. & Sm. 107; *Schweitzer* v. *Mayhew*, 31 Beav. 37.

(*f*) *Balfe* v. *Lord*, *sup.*

necessities and justice of the case require, the holder of such a security may obtain the aid of the Court to effect a sale (*g*).

Trust for sale.

Though under a trust for sale there is no right of foreclosure, the right of redemption exists (*h*); and on a failure to redeem, the creditor's right to sell will become immediate and indefeasible (*i*).

Trust deed collateral to mortgage.

In a case where a mortgagee made a further advance, and took as a security a further charge and covenant, and also an assignment of a policy of assurance upon trust to receive the insurance moneys when payable, and thereout pay the mortgage, it was held that the mortgagee was entitled to the usual decree of foreclosure of the real estate, and to retain the policy upon the terms of the trust, but not to a sale of the policy, although, if the policy had been simply assigned as a security, he would have been entitled to a sale of it (*k*).

Mortgage for term and trust for sale of fee.

But in another case, where the mortgage debt was secured by a mortgage for a term and trust for sale of the fee, and the bill prayed a sale, the Court held that the mortgagee was not entitled to any other relief than that prayed, but that he might amend, and pray a foreclosure of the term; but that the term being foreclosed, the debt would be satisfied, and the fee held for the mortgagors (*l*).

Trust for sale of reversionary interest.

In some cases of security by way of trust there is no right either to foreclosure or sale. So, where a married woman assigned a reversionary interest, upon trust thereout to retain and pay a debt of her husband, and the deed contained no proviso for redemption or power of sale, it was held that the provisions of the security could not be extended beyond the express terms of the trust, which strictly could only operate when the interest should fall into possession, and accordingly that neither foreclosure nor sale could be decreed (*m*).

Heir or devisee of mortgagee.

It has already been seen that, in the case of a mortgage of realty, the mortgage debt vests in the first instance in the personal representatives of the deceased mortgagee (*n*), but that the legal estate in the mortgaged property vested, in all cases where the mortgagee died prior to the 1st of January,

(*g*) *Sampson* v. *Pattison*, *sup.*

(*h*) *Schweitzer* v. *Mayhew*, 31 Beav. 37; *Wicks* v. *Scrivens*, 1 J. & H. 215, 218; *Pearce* v. *Morris*, L. R. 5 Ch. 230.

(*i*) Dav. Conv. vol. ii. pt. 2, p. 8.

(*k*) *Dyson* v. *Morris*, 1 Ha. 413.

(*l*) *Kerrick* v. *Saffery*, 7 Sim. 317.

(*m*) *Stamford, Spalding, and Boston Banking Co.* v. *Ball*, 4 De G. F. & J. 310.

(*n*) See *ante*, p. 866.

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1882, and still vests, in the case of copyholds to which the mortgagee had been admitted in his lifetime, in his heir-at-law, or customary heir, or devisee (*o*). In cases where the mortgagee died between the 7th of August, 1874, and the 1st of January, 1882, the legal estate was liable to be divested from the heir if the personal representatives exercised their statutory power of conveying the estate (*p*).

In cases where the heir or customary heir or devisee of the mortgaged estates had the legal estate vested in him, he was entitled to bring an action for foreclosure. This right was, however, concurrent with that of the personal representatives of the mortgagee (*q*), or their *cestuis que trust* (*r*), to foreclose by virtue of their respective interests in the mortgage debt.

Right of heir or devisee to foreclosed lands.

Where, after foreclosure by the heir or devisee, the personal representatives of the mortgagee claim to have the benefit of the mortgage, it seems that the heir or devisee may either make over the estate to the personal representatives, or keep it for himself, paying over to the latter the moneys due on the mortgage (*s*).

Personal representatives of mortgagee.

Now, in cases where the mortgagee of freeholds (*t*), or of copyholds to which he has not been admitted (*u*), has died since the 1st of January, 1882, the foreclosure must be brought by the personal representatives of the deceased mortgagee or the *cestuis que trust* of the mortgage debt.

Transferee of mortgage.

Where the mortgagee has assigned his mortgage *inter vivos*, such assignee (or the last assignee, if there have been several assignments) may alone foreclose, without bringing the original mortgagee (or the intermediate assignees) before the Court (*x*). But in such a case questions may arise as to equities between the mortgagor and the assignees by reason of any payments made by the mortgagor without notice of the transfer (*y*).

Sub-mortgagee.

A sub-mortgagee may foreclose the original mortgagor (*z*).

If after the institution of a foreclosure suit, but before a decree, the mortgagee assigns his interest, by way of sub-

(*o*) See *ante*, p. 867.
(*p*) 37 & 38 Vict. c. 78, s. 4.
(*q*) *Scott* v. *Nicoll*, 3 Russ. 476.
(*r*) *Wood* v. *Williams*, 4 Madd. 186.
(*s*) *Clerkson* v. *Bowyer*, 2 Vern. 66. And see 5 Bac. Abr. 102, tit. Mortgage (E.).
(*t*) 44 & 45 Vict. c. 41, s. 30; and see now the wider provisions of the Land Transfer Act, 1897, s. 1.
(*u*) 57 & 58 Vict. c. 46, s. 88.
(*x*) 1 Dan. Ch. Pr. (7th ed.) 173, 186.
(*y*) *Withington* v. *Tate*, L. R. 4 Ch. 288. See *Haywood* v. *Gregg*, 24 W. R. 157.
(*z*) *Hobart* v. *Abbott*, 2 P. Wms. 643.

mortgage, the sub-mortgagee may come in and obtain the benefit of the foreclosure suit (*a*).

Where mortgagees assigned the mortgage debt with other property to trustees for the benefit of their creditors by a deed which expressly reserved the benefit of the mortgage security, and provided that the surplus moneys, after satisfying the creditors, should be paid to the mortgagees, it was held that the mortgagees were entitled to foreclose notwithstanding the assignment (*b*).

Mortgagee after assignment in trust for creditors.

Where a mortgagee has become bankrupt, his trustee in the bankruptcy can obtain a decree for foreclosure without making an application to the Court of Bankruptcy (*c*).

Trustee in mortgagee's bankruptcy.

A mortgagee may bring an action for foreclosure notwithstanding the bankruptcy of the mortgagor (*d*); but it has been said that the Court of Bankruptcy might restrain the mortgagee from proceeding with the action, if it appear more convenient that a sale should take place under the bankruptcy (*e*).

Mortgagee may foreclose bankrupt mortgagor.

The trustee in bankruptcy of a mortgagee may proceed either in the Chancery Division or in bankruptcy (*f*).

ii.—**What Mortgaged Property may be Foreclosed.**—As a general rule, the Court will give the benefit of foreclosure in every case where money is lent on a security of the nature of a mortgage (*g*). And in particular, mortgagees of the following kinds of property have been held entitled to foreclosure.

Right of foreclosure generally incident to mortgage.

A mortgagee of an advowson may claim foreclosure (*h*), though it seems that even under the former practice he might have obtained an order for sale (*i*).

Advowson.

Chambers in the Inns of Court appear to be subject to the local jurisdiction and authority of the benchers, and the Courts of law will not interfere in respect of them; but if the benchers decline to exercise their authority, or if they consent to an action being brought, the ordinary Courts will take cognizance of the question; and, therefore, if the benchers refuse to make an

Chambers in Inns of Court.

(*a*) *Ward* v. *Forrest*, 10 Beav. 552.

(*b*) *Morley* v. *Morley*, 25 Beav. 253.

(*c*) *Waddell* v. *Toleman*, 9 Ch. D. 212.

(*d*) *White* v. *Simmons*, L. R. 6 Ch. 555; *Exp. Pannell, Re England*, 6 Ch. D. 335, C. A.

(*e*) Per Vaughan Williams, J., in his Treatise on Bankruptcy (7th ed.), 377; *post*, Chap. LI. (i).

(*f*) *Waddell* v. *Toleman*, *sup.*

(*g*) *Balfe* v. *Lord*, 2 Dr. & War. 480, 489. And see *ante*, p. 15.

(*h*) *Gardiner* v. *Griffith*, 2 P. Wms. 403; *Long* v. *Storie*, 3 De G. & Sm. 308.

(*i*) See *Mackenzie* v. *Robinson*, 3 Atk. 599.

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order for the foreclosure or sale of chambers in mortgage, a decree may be obtained in the High Court of Justice (*k*).

Consols.

A mortgagee of a reversionary interest in stock in the public funds may bring an action for foreclosure (*l*).

Shares.

Where a certificate of shares in a limited company is deposited as security for a debt, the depositee is entitled to foreclosure (*m*). So, also, a mortgagee by transfer with a power of sale of railway shares (*n*).

Pension.

A mortgagee of a pension may foreclose (*o*).

Share in partnership.

A mortgagee of a share in a partnership is entitled to foreclosure, and to an account of the profits of the partnership made after the commencement of the action, and of the existing debts and liabilities of the partnership, and to have the share of such debts and liabilities attributable to the mortgaged share ascertained (*p*). But the Court cannot make an order for sale of the share in lieu of foreclosure (*q*).

Chattels.

Independently of statute, it was said that a mortgagee of chattels had a right to foreclose (*r*); but this right is now superseded and virtually rendered obsolete by the power of seizure given by sect. 7 of the Bills of Sale Act, 1882 (*s*), except as regards debentures secured upon the chattels and effects of an incorporated company to which this Act does not apply (*t*).

Reversionary interest of surety.

As no relief will be given against a surety beyond the express terms of his contract, his mortgage of a reversionary interest will not be subject either to sale or foreclosure if its operation be limited to the application of the proceeds when it falls into possession (*u*).

Separate mortgages to same person.

Where a mortgagee having separate mortgages on different estates created by the same mortgagor is not allowed to consolidate the mortgage debts, he may nevertheless claim in the

(*k*) *Salesbury* v. *Brown*, 2 P. Wms. 511.

(*l*) *Slade* v. *Rigg*, 3 Ha. 35; *Wright* v. *Bircham*, 9 Ha. 62.

(*m*) *Harrold* v. *Plenty*, (1901) 2 Ch. 314.

(*n*) *General Credit and Discount Co.* v. *Glegg*, 22 Ch. D. 549.

(*o*) *James* v. *Ellis*, 19 W. R. 319.

(*p*) *Bolenquet* v. *Foster*, L. R. 2 Eq. 467; but see *ante*, p. 521.

(*q*) *Ibid.*; *Exp. Braithwaite*, 4 D. & C. 3.

(*r*) *Harrison* v. *Hart*, Comyns. 393; *Barwell* v. *Potts*, 2 Fonb. Eq. (5th ed.) vol. ii. p. 261, n.; but see *Harrold* v. *Plenty*, *sup.*

(*s*) 45 & 46 Vict. c. 43. See *ante*, p. 230.

(*t*) 45 & 46 Vict. c. 43, s. 17. See *ante*, p. 218.

(*u*) *Stamford, &c. Banking Co.* v. *Ball*, 4 De G. F. & J. 310.

same action to foreclose each estate separately on non-payment of the amount charged upon it (*x*).

Estoppel.

Where a mortgagee obtained an order for foreclosure *nisi* in respect of five charges on the property, but accidentally omitted a sixth charge, he was not estopped from bringing a fresh action for foreclosure on all six charges, the subject-matter of the second action not being *res judicata* (*y*).

Mortgage of term.

Where a debt is secured by a mortgage of an estate for a term of years with a trust for sale of the fee, the mortgagee, if he prays a sale only, will not be entitled to foreclose the fee, nor, unless he amends his pleadings, to foreclose the term (*z*).

Mortgage of leaseholds by demise.

When a mortgage is of leaseholds by sub-demise, with a declaration of trust of the reversion, the mortgagee may obtain judgment *nisi* for foreclosure of the term, but will not be entitled to a vesting order as to the reversion until the final order for foreclosure absolute (*a*).

Mortgage of land abroad.

A foreclosure decree being a decree *in personam* depriving a mortgagor of his personal right to redeem, an English mortgagee of land in a British colony or dependency has the right to foreclose his mortgage in respect of such land (*b*).

No foreclosure or sale of undertaking of railway or other public company.

The holder of a mortgage or debenture secured upon the undertaking of a railway, canal, or other company established by the legislature for carrying out a public object, whether the rolling stock is or is not expressed to be included in the security, is not entitled to foreclosure or sale (*c*).

Tramways.

The same principle applies to all tramway companies governed by the Tramways Act, 1870 (*d*), whether the promoters are local authorities or private individuals, or companies formed under the Companies Act, no less than to such companies created by special Act of Parliament (*e*).

Foreclosure of security of joint stock company.

In the case of an ordinary company, a mortgagee or debenture holder has, like a mortgagee who has lent money to an

(*x*) *Holmes* v. *Turner*, 7 Ha. 367, n., where a form of foreclosure order applicable to such cases will be found. As to consolidation, see *ante*, Chap. XLIII.

(*y*) *Bake* v. *French*, (1907) 1 Ch. 428.

(*z*) *Kerrick* v. *Saffery*, 7 Sim. 317.

(*a*) *British Empire Assurance Co.* v. *Sugden*, 47 L. J. Ch. 691. But see *London and County Banking Co.* v. *Goddard*, (1897) 1 Ch. 642.

(*b*) *Paget* v. *Ede*, L. R. 18 Eq. 118. See *Toller* v. *Carteret*, 2 Vern. 494; *Colyer* v. *Finch*, 5 H. L. C. 915; *post*, p. 1051.

(*c*) *Furness* v. *Caterham Rail. Co.*, 25 Beav. 614; *Gardner* v. *London, Chatham, and Dover Rail. Co.*, L. R. 2 Ch. 201; *Blaker* v. *Herts and Essex Waterworks Co.*, 40 Ch. D. 399.

(*d*) 33 & 34 Vict. c. 78.

(*e*) *Marshall* v. *South Staffordshire Tramways Co.*, (1895) 2 Ch. 36, at p. 54, C. A.

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individual, the right to enforce his security by foreclosure or sale.

Floating security.

A debenture in the usual form of a floating equitable charge upon all the property of the company, present and future, including uncalled capital, gives to the holder a right, in the event of the debenture becoming immediately payable in consequence of a voluntary winding-up, to foreclose not only the present property of the company, but also its uncalled capital (*f*). And the order may be made upon an originating summons (*g*).

Leave to bring foreclosure action in winding-up.

Leave to bring an action for foreclosure may be given by the Court, notwithstanding that the company has been ordered to be compulsorily wound up (*h*), and whether the action was previously (*i*) or subsequently (*k*) commenced, unless the liquidator gives the relief claimed in the action (*l*). But such leave may apparently be refused if the security is merely an equitable charge giving the holder a right to be paid out of the assets of the company in priority to other creditors (*m*). If the mortgage is of the whole undertaking, the mortgagee or debenture holder will obtain leave to bring his action to realize his security as a matter of course, as the commencement of the winding-up renders the mortgage money immediately payable, though there is no express stipulation to that effect (*n*).

Foreclosure upon default.

iii.—**When the Right to Foreclosure arises.**—Proceedings for foreclosure on a mortgage security cannot be maintained until the estate has become forfeited at law by default in payment on the day appointed (*o*). This proposition, however, is only founded on a *dictum*. It does not mean that a fore-

(*f*) *Sadler* v. *Worley*, (1894) 2 Ch. 170, where see for form of order for foreclosure judgment on a mortgage debenture, at p. 177. See also *Halifax, &c. Banking Co.* v. *Radcliffe, Limited*, W. N. (1895) 63; *Madeley* v. *Ross, Sleeman & Co.*, (1897) 1 Ch. 505. A foreclosure order cannot be made in the absence of any one debenture holder. See *Re Continental Oxygen Co., Elias* v. *Continental Oxygen Co.*, (1897) 1 Ch. 511.

(*g*) *Oldrey* v. *Union Works*, 72 L. T. 627; but see *post*, p. 1056.

(*h*) *Marshall* v. *Glamorgan Iron Co.*, L. R. 7 Eq. 129. See *Perry* v. *Oriental Hotels Co.*, L. R. 5 Ch. 420; *Re Longdendale Co.*, 8 Ch. D. 150; *Re Henry Pound, Son, and Hutchins*, 42 Ch. D. 402, C. A.

(*i*) *Re David Lloyd & Co.*, 6 Ch. D. 639, C. A.

(*k*) *Strong* v. *Carlyle Press* (1893) 1 Ch. 268.

(*l*) *Barney* v. *Stubbs*, (1891) 1 Ch. 187, 475.

(*m*) *Jones* v. *Swansea, &c. Co.*, 50 L. J. Q. B. 428.

(*n*) *Hodson* v. *Tea Co.*, 14 Ch. D. 859; *Wallace* v. *Universal Automatic Machine Co.*, (1894) 2 Ch. 547, C. A.

(*o*) *Bonham* v. *Newcomb*, 1 Vern. 232.

closure action cannot be maintained until the money has become payable, though the plaintiff might not be able to get a decree until then. Where there is a floating security the holder has a right to issue a writ before the money has become payable, and if at the hearing the money has become due or the security has crystallised, the Court can make an order for realisation or foreclosure (*p*).

If the principal is made payable at a distant date, non-payment of interest in the meantime pursuant to the terms of the mortgage will be a sufficient default (*q*).

A mortgagee may bring an action for foreclosure at any time after the mortgagor has made default, in the absence of any stipulation to the contrary.

Where no time is limited for repayment of the principal, the mortgagee may proceed to enforce his security at any time after its creation on giving reasonable notice (*r*).

Stipulation postponing right to foreclose.

A mortgagee may by agreement debar himself of the right to foreclose for a given period (*s*); and such period may be for a term of years or for the life of the mortgagor (*t*).

Reversionary interest.

In the case of a mortgage of a reversionary interest containing a proviso for redemption on or before the death of the tenant for life, and separate covenants for payment of the principal on his death, and for payment of interest during his life, the mortgagee's right of foreclosure does not arise till the death of the tenant for life (*u*).

In a similar case where there was a covenant to pay principal in 1914 and interest half-yearly in the meantime, with a proviso for redemption on payment in 1914 of principal with interest which might be due and unpaid, and the mortgagor made default in payment of interest, it was held that the mortgagee's right to foreclose did not arise till 1914 (*x*).

Revivor of conditional bar of right to foreclosure.

If the bar of the right to foreclose is made conditional on regular payment of the interest, it may be revived by subsequent

(*p*) *Re Carshalton Park Estate*, (1908) 2 Ch. 62.

(*q*) *Stanhope* v. *Manners*, 2 Ed. 197; *Gladwyn* v. *Hitchman*, 2 Vern. 135. See *Re Taaffe*, 14 Ir. Ch. R. 347.

(*r*) *Fitzgerald* v. *Mellersh*, (1892) 1 Ch. 385. See *Deverges* v. *Sandeman*, (1902) 1 Ch. 579, C. A.

(*s*) *Ramsbottom* v. *Wallis*, 5 L. J. N. S. Ch. 92; *Williams* v. *Morgan*, *inf.*

(*t*) *Burrowes* v. *Molloy*, 2 J. & L. 521. See further as to provisoes postponing the right to call in the principal, *ante*, p. 141.

(*u*) *Re Turner's Estate*, *Turner* v. *Spencer*, 43 W. R. 153.

(*x*) *Williams* v. *Morgan*, (1906) 1 Ch. 804.

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acceptance of interest waiving the default (*y*). But acceptance of interest due, after a demand for payment of principal and interest, will not amount to a waiver, so as to revive the bar of the right to foreclose in respect of the principal (*z*).

Mortgagee may foreclose till paid off.

A mortgagee retains his right to bring an action for foreclosure until he is actually paid off, notwithstanding notice by the mortgagor to pay off the mortgage, and even notwithstanding a decree for redemption (*a*), or though he has received part of his debt if not fully paid (*b*), or even after giving a receipt in full and delivering the deeds to the mortgagor if bills or other securities taken in payment are dishonoured or prove to be defective or insufficient (*c*).

No foreclosure for costs only.

But a mortgagee whose principal and interest have been paid off is not entitled to foreclosure in respect of a balance of costs still remaining unpaid (*d*).

Collateral securities should first be enforced.

Where a mortgagee holds collateral securities for the mortgage debt, the course usually pursued by the Court is to direct him first to realize them and then to proceed to foreclose the mortgage for so much of his debt as the collateral securities may not satisfy; for it is only by realizing his collateral securities, and afterwards proceeding to foreclose the mortgage, that a mortgagee can get a valid decree for foreclosure without foregoing the benefit of the collateral securities (*e*).

General rule as to parties to foreclosure actions.

iv.—Parties to an Action for Foreclosure.—The general rule of the Court is, that all persons having an interest in the mortgage security, or in the equity of redemption, must be made parties to an action for foreclosure; and that unless all such persons are before the Court, there can be no foreclosure (*f*).

Mortgagee.

The mortgagee or mortgagees, or some or one of several mortgagees or persons claiming under him or them, will be the plaintiff or plaintiffs.

(*y*) *Langridge* v. *Payne*, 2 J. & H. 423.
(*z*) *Keene* v. *Biscoe*, 8 Ch. D. 201; *Re Taaffe*, 14 Ir. Ch. R. 347.
(*a*) *Grugeon* v. *Gerrard*, 4 Y. & C. Ex. 119.
(*b*) *Lockhart* v. *Hardy*, 9 Beav. 349; *Palmer* v. *Hendrie*, 27 Beav. 349.
(*c*) *Teed* v. *Carruthers*, 2 Y. & C. C. C. 31; *Shore* v. *Shore*, 2 Ph. 378.
(*d*) *Drought* v. *Redford*, 1 Moll. 572.
(*e*) *Dyson* v. *Morris*, 1 Ha. 413, 423.
(*f*) *Palmer* v. *Carlisle*, 1 S. & St. 423; *Vickers* v. *Cowell*, 1 Beav. 429; *Caddick* v. *Cook*, 32 Beav. 70.

Mortgagor.

The mortgagor or mortgagors or persons claiming under him or them will be defendant or defendants.

Other parties.

It will, however, often be necessary that other persons not strictly coming under the above designations should be made parties.

A person cannot be plaintiff and defendant in the same action (*g*).

Disclaiming defendants.

If some of the defendants disclaim, a decree of foreclosure may be obtained against them, if of importance to the plaintiff's title, and an account directed against the rest (*h*).

Personal representatives of mortgagee dying before 1882.

If the heir or customary heir or devisee of mortgage estates of a mortgagee who died before 1882 brings an action for foreclosure, the personal representatives of the mortgagee must generally be made parties, as being entitled to the mortgage moneys as part of the mortgagee's personal estate, and being therefore interested in the taking of the accounts in the action (*i*).

Where a vendor took an equitable mortgage by deposit of the deeds of the property sold to secure the payment of the balance of the purchase-money, his personal representatives were held to be necessary parties to an action by the trustees of his personal estate for foreclosure (*k*).

The person in whom the legal estate in the mortgaged property is vested must be co-plaintiff (*l*) or defendant (*m*), whether the estate is vested in such person under the original mortgage (*n*), or by assignment (*o*), or by devise before 1882 (*p*), or by devolution since that date.

Heir or devisee of mortgagee dying before 1882.

So if the mortgagee died before 1882, the heir-at-law or devisee of mortgage estates must be a party to an action for foreclosure brought by the executors of the mortgagee (*q*).

Where the mortgagee devised as well the legal estate in

(*g*) *Wavell* v. *Mitchell*, W. N. (1891) 86.

(*h*) *Collins* v. *Shirley*, Russ. & M. 638; *Perkin* v. *Stafford*, 10 Sim. 562. See *Davis* v. *Whitmore*, 28 Beav. 617.

(*i*) See *Freake* v. *Horseley*, Freem. Ch. 180; *Gobe* v. *Carlisle*, cited 2 Vern. 67.

(*k*) *Cave* v. *Cork*, 2 Y. & C. C. C. 130.

(*l*) *Smith* v. *Chichester*, 2 Dr. & War. 404.

(*m*) *Browne* v. *Lockhart*, 10 Sim. 426.

(*n*) *Wood* v. *Williams*, 4 Madd. 186.

(*o*) *Wetherell* v. *Collins*, 3 Madd. 255.

(*p*) *Hichens* v. *Kelly*, 2 Sm. & G. 264; *Bartle* v. *Wilkin*, 8 Sim. 238. See *Capper* v. *Terrington*, 1 Coll. 103.

(*q*) See cases cited *sup.* in notes (*n*) and (*p*).

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the mortgaged lands as also the beneficial interest in the money secured to the same person, the devisee might foreclose without making the heir of the original mortgagee a party (*r*).

So, where an action for foreclosure was brought by a devisee of mortgage estates, the heir of the mortgagee was not a necessary party (*s*); and if the devisee made the heir a party, he was not allowed the costs out of the estate (*t*). If, however, the devisee of the mortgagee claims to have the will established, or if his title as devisee is doubtful (*u*), he must make the heir a party as defendant (*x*). But the heir of a subsequent mortgagee, not having the legal estate, must not be made a party to an action for foreclosure brought by a prior mortgagee (*y*).

Heir not found.

Where the heir, being a necessary party, cannot be found, the Attorney-General must be made a party (*z*); and his nonjoinder cannot be remedied by his appearance by counsel at the hearing (*a*).

Heir out of jurisdiction.

If the heir or devisee is out of the jurisdiction, the cause must stand over till the defect is remedied (*b*), unless the purchaser of the equity of redemption under a contract is before the Court (*c*).

Heir or devisee of mortgagee dying after 1881 not a necessary party.

Where the mortgagee has died since the 1st of December, 1881, it is obvious that as the heir does not take any estate by descent in mortgaged freeholds or copyholds to which the mortgagee has not been admitted, and as a devise of mortgage estates in such property is nugatory, the heir or devisee cannot bring, and ought not to be made a party to, an action for foreclosure.

Personal representatives of mortgagee so dying.

In such cases, the mortgaged lands devolve as chattels real, and, accordingly, the personal representatives of the mortgagee being the persons in whom the legal estate is vested must be made parties to every action for foreclosure, either as plaintiffs or defendants (*d*).

(*r*) *Renvoize* v. *Cooper*, 6 Madd. 371.

(*s*) *How* v. *Vigures*, 1 Rep. in Ch. 32.

(*t*) *Skipp* v. *Wyatt*, 1 Cox, 353; *Lewis* v. *Nangle*, 2 Ves. Sen. 430; *Uppington* v. *Bullen*, 2 Dr. & War. 184.

(*u*) *Earl of Macclesfield* v. *Fitton*, 1 Vern. 168.

(*x*) *Lewis* v. *Nangle*, *sup.*

(*y*) *Whitla* v. *Halliday*, 4 Dr. & War. 267.

(*z*) *Smith* v. *Bicknell*, 3 V. & B. 53, n.; *Casberd* v. *Ward*, 6 Pri. 411.

(*a*) *Catley* v. *Sampson*, 33 Beav. 551.

(*b*) *Fell* v. *Brown*, 2 Bro. C. C. 276; *Farmer* v. *Curtis*, 2 Sim. 466.

(*c*) *Howes* v. *Wadham*, Ridg. Ca. t. Hard. 201. And see *Runcorn* v. *Nicholson*, 5 L. J. N. S. Ch. 203.

(*d*) 44 & 45 Vict. c. 41, s. 30, *ante*, p. 866.

Where, however, the mortgage property is copyhold to which the mortgagee has been admitted, the customary heir or devisee must be plaintiff or defendant, and if he is plaintiff, he must make the personal representatives of the mortgagee parties (*e*).

Exception as to copyholds.

If the mortgage is vested in trustees, they must be made defendants to an action for foreclosure brought by a *cestui que trust* (*f*).

Trustee-mortgagees.

Where the mortgagee had settled the security, it was held that the first tenant in tail at least must be brought before the Court (*g*). As a general rule, it is sufficient if the first tenant in tail is made a party (*h*), unless the estate tail is contingent, in which case the remainderman who has the prior vested estate in remainder ought to be a party (*i*).

Remainderman.

All intermediate tenants for life must be made parties (*k*). So, also, trustees to preserve contingent remainders (*l*).

Where the sole defendant to a foreclosure action was legal personal representative and also tenant for life, the Court required the remaindermen to be added as parties (*m*).

If there are several mortgagees who are joint tenants or tenants in common of the moneys secured, they must all be parties to the foreclosure (*n*). And accordingly, where one of several mortgagees sues alone for foreclosure, the others must be made defendants (*o*).

Co-mortgagees.

So, in an old case, where one of several persons who had taken a mortgage in the name of a trustee sued for foreclosure, it was held that the others must be parties (*p*).

Several *cestuis que trust*.

As a general rule, however, trustees, executors, and administrators will sufficiently represent the persons beneficially interested in the trust or estate either as plaintiffs or defen-

Trustees, executors, &c.

(*e*) 57 & 58 Vict. c. 46, s. 88, *post*, p. 1043.

(*f*) *Wood* v. *Williams*, 4 Madd. 186.

(*g*) *Yates* v. *Hambly*, 2 Atk. 237.

(*h*) *Roscarrick* v. *Barton*, 1 Ch. Ca. 217; *Reynoldson* v. *Perkins*, Amb. 564.

(*i*) *Sutton* v. *Stone*, 2 Atk. 101. See *Fishwick* v. *Lowe*, 1 Cox, 411.

(*k*) *Gore* v. *Stacpoole*, 1 Dow, 18.

(*l*) *Hopkins* v. *Hopkins*, 1 Atk. 490; *Cholmondeley* v. *Clinton*, 2 J. & W. 133.

(*m*) *Watts* v. *Lane*, 84 L. T. 144. But see *Re Harrowby and Paine*, *inf.*

(*n*) *Lowe* v. *Morgan*, 1 Bro. C. C. 368; *Vickers* v. *Cowell*, 1 Beav. 529.

(*o*) *Luke* v. *South Kensington Hotel Co.*, 11 Ch. D. 121, C. A.

(*p*) *Lowe* v. *Morgan*, 1 Bro. C. C. 368. But see *Montgomerie* v. *Bath*, 3 Ves. 560; and Pow. Mtg. 964, N. C.

dants (*q*), and may accordingly bring actions for foreclosure without making their beneficiaries parties (*r*).

Since the Land Transfer Act, 1897, personal representatives of a deceased mortgagor of real estate sufficiently represent the realty in a foreclosure action (*s*). It seems that all the executors must be parties, whether they have proved or not, unless they have disclaimed (*t*).

A trustee will not sufficiently represent his *cestuis que trust* as defendant to a foreclosure action unless he has funds in his hands sufficient to enable him to redeem; the reason being that all persons must be brought before the Court who are interested in the equity of redemption, and who may be willing and able to redeem (*u*).

A trustee who has become bankrupt cannot properly represent his beneficiaries in a foreclosure action, but the beneficiaries must be made parties (*x*). And *quære*, whether even a solvent trustee who was a mortgagee could sufficiently represent his *cestui que trust* as defendant to a foreclosure action (*y*).

The trustees and *cestuis que trustent* under a specific bequest by a mortgagor of leaseholds are proper parties to a foreclosure action (*z*).

If a mortgagee unnecessarily makes the beneficiaries parties, he may be ordered to pay their costs (*a*).

All the trustees must be parties to an action for foreclosure; and where a trustee had retired, but without a new trustee being appointed in his place, it was held that he was a necessary party to an action brought by his co-trustees for foreclosure of a mortgage which had been made to them alone, after he had retired, on a loan of trust moneys (*b*).

Where one of two executors of a mortgagee absconded, and

(*q*) R. S. C. Ord. XVI. r. 8, set out *ante*, p. 749. This rule expressly provides that it "shall apply to trustees, executors and administrators sued in proceedings to enforce a security by foreclosure or otherwise."

(*r*) *Morley* v. *Morley*, 25 Beav. 253; *Re Mitchell, Wavell* v. *Mitchell*, W. N. (1892) 11. See *Re Booth and Kettlewell's Contract*, W. N. (1892) 156.

(*s*) *Re Harrowby and Paine*, W. N. (1902) 137.

(*t*) *Re Pawley*, (1900) 1 Ch. 58. But see now Conveyancing Act, 1911, s. 12.

(*u*) *Goldsmid* v. *Stonehewer*, 9 Ha. App. xxxviii.; *Mills* v. *Jennings*, 13 Ch. D. 639, at pp. 649, 650, C. A.

(*x*) *Francis* v. *Harrison*, 43 Ch. D. 183.

(*y*) *Ibid.* p. 184. But see now Ord. XVI. r. 8, set out *ante*, p. 749.

(*z*) *Ward* v. *Forrest*, 10 Beav. 552.

(*a*) *Re Cooper, Cooper* v. *Vesey*, 20 Ch. D. 611, C. A.

(*b*) *Adams* v. *Paynter*, 1 Coll. 533.

the other executor sued the mortgagor, the Court refused to add the absconding executor as defendant (*c*).

Sub-mortgagee.

In the case of a sub-mortgage, the original mortgagee, or his personal representatives, if he is dead, as having a right to redeem the sub-mortgagee, are necessary parties to the suit of the sub-mortgagee to foreclose the original mortgage (*d*).

Legal estate.

Although, as a general rule, the person seised of the legal estate must be a party (*e*), the mortgagee of an equitable interest in property may foreclose the equity of redemption, leaving the legal title in a third party, as in the instance of foreclosure by a second mortgagee against the mortgagor. So a mortgagee of a reversion in stock, which is necessarily an equitable interest, may bring an action for foreclosure against the mortgagor alone (*f*).

Mortgagor a necessary party.

In mortgages of real estate, whether in fee or for a term of years, the mortgagor, if not bankrupt (*g*), or his heir (*h*), or, if he died since 1897, his legal personal representative (*i*), is an absolutely necessary party in a suit for foreclosure (*k*), however remote his chance of redeeming may be. Also the trustee of the mortgagor to bar dower (*l*).

All mortgagor's interests bound.

Where a mortgagor has several interests, all are bound by foreclosure though only one is mentioned (*m*).

Mortgagor after assignment.

A mortgagor who has absolutely assigned the equity of redemption loses his right to redeem, and accordingly is not a necessary party to a foreclosure action; but if the mortgagee makes him a party to the action for the purpose of suing him on his personal covenant for payment of principal and interest, his right to redeem revives (*n*).

Derivative mortgage.

The mortgagor need not be a party in a foreclosure suit between the mortgagee and his derivative or sub-mortgagee (*o*).

Mortgagor of part of estate.

Where a part only of the premises is comprised in a second

(*c*) *Drage* v. *Hartopp*, 28 Ch. D. 414.
(*d*) *Hobart* v. *Abbott*, 2 P. Wms. 642.
(*e*) See *sup.* p. 1037.
(*f*) *Slade* v. *Rigg*, 3 Ha. 35, 38.
(*g*) *Lloyd* v. *Lander*, 5 Madd. 282.
(*h*) *Farmer* v. *Curtis*, 2 Sim. 466.
(*i*) *Re Harrowby and Paine*, W. N. (1902) 137.
(*k*) *Howes* v. *Wadham*, Ridg. Ca. t. Hard. 199; *Moore* v. *Morton*, W. N. (1886) 196.
(*l*) *Horrocks* v. *Ledsam*, 2 Coll. 208.
(*m*) *Bromitt* v. *Moor*, 9 Ha. 374; *Goldsmid* v. *Stonehewer*, 9 Ha. App. xxxix.
(*n*) *Kinnaird* v. *Trollope*, 39 Ch. D. 636.
(*o*) Seton on Decrees (6th ed.), 2082.

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mortgage, the owner thereof, though he is not the original mortgagor, is a necessary party (*p*).

Surety.

The mortgagor of another estate charged as a collateral security is a necessary party (*q*). But a surety is not a necessary party where he is bound by a personal covenant only, unless he have paid off part of the debt (*r*).

Executor of mortgagor before 1897.

Prior to the Conveyancing Act and the Land Transfer Act, 1897, the executor of the mortgagor was not generally made a party where the mortgage was of the fee (*s*); and it was so held where the mortgage was of freeholds for a term of years (*t*). In a suit for the execution of a trust for sale by way of mortgage, the executor of the mortgagor was a necessary party (*u*).

Before Locke King's Act (*x*), the executor was a necessary party (*y*), and, in such cases, the costs of the executor were payable by the plaintiff, who added them to his security (*z*).

Even where a mortgage of the fee falls within Locke King's Act (*a*), it would seem that as an account of the debt is always directed, the executor ought to be made a party in cases where it is doubtful whether the mortgaged property is sufficient to satisfy the amount due (*b*).

So the personal representative of the mortgagor was a necessary party where, by his will, the realty was to be exonerated out of the personalty (*c*); unless the mortgagor had been dead many years, and the mortgaged estate was regarded as the only available property (*d*); and similarly in the case of a deceased partner, whose personal estate was liable to exonerate the realty (*e*).

Executor of tenant for life.

The personal representative of a deceased tenant for life, who

(*p*) *Palk* v. *Clinton*, 12 Ves. 48; *Jones* v. *Smith*, 2 Ves. Jun. 372; *Thornycroft* v. *Crockett*, 2 H. L. C. 239.

(*q*) *Stokes* v. *Clendon*, 3 Swanst. 150, n.

(*r*) *Newton* v. *Earl of Egmont*, 4 Sim. 574; *Gedye* v. *Matson*, 25 Beav. 310.

(*s*) *Duncombe* v. *Hansley*, 3 P. Wms. 333, n. See 5 Bac. Abr. 101; *Fell* v. *Brown*, 2 Bro. C. C. 276. See *Grace* v. *Lord Mountmorris*, 2 Dr. & War. 432.

(*t*) *Bradshaw* v. *Outram*, 13 Ves. 234. See *Bamfield* v. *Vaughan*, Rep. t. Finch, 104.

(*u*) *Christophers* v. *Sparke*, 2 J. & W. 229; *Daniell* v. *Skipwith*, 2 Bro. C. C. 155.

(*x*) *Ante*, p. 792.

(*y*) *Scholefield* v. *Heafield*, 7 Sim. 667; 8 Sim. 470.

(*z*) *Woodward* v. *Haddon*, 4 Sim. 606; *Weaving* v. *Count*, 6 Sim. 439; *Boswell* v. *Tucker*, 1 Beav. 493.

(*a*) See *ante*, p. 792.

(*b*) See *Daniell* v. *Skipwith*, 2 Bro. C. C. 155; *Knight* v. *Knight*, 3 P. Wms. 331 (both cases under the old law).

(*c*) *Faulkner* v. *Daniel*, 3 Ha. 199.

(*d*) *Faulkner* v. *Daniel*, 3 Ha. 199, 213.

(*e*) *Scholefield* v. *Heafield*, 7 Sim. 667; 8 Sim. 470.

took under the mortgagor's will, was not a necessary party (*f*); but he was a necessary party if the deceased had made payments on account of principal (*g*).

Where mortgage is of personalty.

The personal representative of the mortgagor is, of course, a necessary party to an action for foreclosure, when the mortgage is of leaseholds or other personalty (*h*), and he is now a necessary party where the mortgage is of freeholds. If there is no representative of the mortgagor, an order for foreclosure will not, generally, be made until a representative has been properly constituted (*i*). But when a defendant, who was one of a numerous class of debenture holders, died pending a foreclosure action, his widow was appointed to represent his estate until some person should be duly constituted his personal representative (*k*).

Where realty and personalty are mortgaged together.

Where freeholds and leaseholds are comprised in the same mortgage, both the heir and the personal representatives of the mortgagor were necessary parties (*l*); but now, since the Land Transfer Act, 1897, the legal personal representative alone is sufficient (*m*).

Copyholds.

The heir of the mortgagor is still a necessary party to a foreclosure action where the mortgage consists of copyholds to which the mortgagor has been admitted (*n*), but not where his estate was only equitable (*o*).

Limited administrator.

An administrator acting under limited letters of administration sufficiently represents the estate of a mortgagor unless the authority conferred by the letters of administration are so limited that the purposes of the suit require a more general administration (*p*).

Administrator *durante minore ætate*.

An administrator *durante minore ætate* has for the time all the powers of an ordinary administrator (*q*).

Administrator *pendente lite*.

An administrator *pendente lite* does not sufficiently represent

(*f*) *Wynne* v. *Styan*, 2 Ph. 302.
(*g*) *Cholmondeley* v. *Clinton*, 2 Mer. 171; *Faulkner* v. *Daniel*, *sup.*
(*h*) *Wilton* v. *Jones*, 2 Y. & C. C. C. 244.
(*i*) *Aylward* v. *Lewis*, (1891) 2 Ch. 81.
(*k*) *Scott* v. *Streatham and General Estates Co.*, W. N. (1891) 153. See *Neal* v. *Barrett*, W. N. (1887) 88.
(*l*) *Robins* v. *Hodgson*, cit. Dan. Ch. Pr. (7th ed.) 219.
(*m*) *Re Harrowby and Paine*, W. N. (1902) 137.
(*n*) 60 & 61 Vict. c. 65, s. 1 (2).
(*o*) *Re Somerville and Turner*, (1903) 2 Ch. 583.
(*p*) *Faulkner* v. *Daniel*, 3 Ha. 199; *Davis* v. *Chanter*, 2 Ph. 545; *Maclean* v. *Dawson*, 27 Beav. 369; *Clough* v. *Dixon*, 10 Sim. 564; *Groves* v. *Lane*, 16 Jur. 854, 1061; *Dowdeswell* v. *Dowdeswell*, 9 Ch. D. 294, C. A.
(*q*) *Re Cope, Cope* v. *Cope*, 16 Ch. D. 49.

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the mortgagor's estate; a general administrator is a necessary party (*r*).

Where no representative.

Where there is no personal representative the Court may now proceed in his absence or may appoint some person to represent the estate (*s*). But the Court has refused to make an order absolute under this rule (*t*).

Administrators, &c. of felons.

As there is now no forfeiture for felony or treason (*u*), the administrators or the interim curator of the estates of felons must be parties.

All purchasers of the equity of redemption, however numerous, must be made parties (*x*).

Purchaser of equity of redemption.

Purchasers for valuable consideration without notice of a subsisting mortgage on the property, which has been sold without disclosing the mortgage, are deemed to be purchasers of the equity of redemption only, and to be liable to foreclosure (*y*).

Different owners of equity of redemption.

If the estates of two different persons be in one mortgage, both the mortgagors must be made parties to foreclosure (*z*). So if the equity of redemption be severed after the mortgage, both the owners of the equity of redemption must be made parties (*a*). So, where a mortgagor has mortgaged Blackacre and Whiteacre, and subsequently has sold Whiteacre to a purchaser, as is alleged, for valuable consideration without notice, such purchaser is nevertheless a necessary party to an action to foreclose Blackacre alone.

Patron of mortgaged benefice.

Where an ecclesiastical benefice is mortgaged under a statutory power, the patron of the living is not a necessary party to an action to foreclose the mortgage (*b*).

Husband and wife.

The wife must be a party where the power of redemption is in husband *or* wife in a mortgage of her leaseholds (*c*).

Partners.

On the same principle, partners of the mortgagor, who have a right of pre-emption over his mortgaged share, are necessary parties to a suit to foreclose the security (*d*).

(*r*) *Ellis* v. *Deane*, Beat. 5; *Cave* v. *Cork*, 2 Y. & C. C. C. 130; *Aylward* v. *Lewis*, (1891) 2 Ch. 81.

(*s*) Ord. XVI. r. 46.

(*t*) *Aylward* v. *Lewis*, *sup.*

(*u*) 33 & 34 Vict. c. 23. See *ante*, p. 665.

(*x*) *Peto* v. *Hammond*, 29 Beav. 91.

(*y*) *Heath* v. *Crealock*, L. R. 10 Ch. 22. See *Hunt* v. *Elmes*, 2 De G. F. & J. 578; *Waldy* v. *Gray*, L. R. 20 Eq. 238; *Greene* v. *Foster*, 22 Ch. D. 566.

(*z*) *Stokes* v. *Clendon*, 3 Swanst. 150, n.; *Payne* v. *Compton*, 2 Y. & C. Ex. 457.

(*a*) *Payne* v. *Compton*, *sup.*

(*b*) *Goodden* v. *Coles*, 59 L. T. 309.

(*c*) *Hill* v. *Edmonds*, 5 De G. & S. 603.

(*d*) *Redmayne* v. *Forster*, L. R. 2 Eq. 467.

Where mortgaged realty is limited in strict settlement, if the first tenant in tail of the equity of redemption be a party to the action, the decree will bind all the remaindermen and the reversioner (*e*), though the first tenant in tail be an infant (*f*). And if a decree for account and foreclosure be obtained, and the first tenant in tail release to the mortgagee, the remaindermen and reversioner will be also bound (*f*).

Tenant in tail.

If there be an express estate for life, the first tenant in tail or the reversioner must be also a party (*g*). So also the intermediate remainderman for life, though contingent; and if the first estate in fee is liable to be defeated by a shifting use or executory devise, the person claiming the benefit of such contingency must likewise be made a party (*h*). But in one instance in which the tenant in tail was abroad (*i*), and out of the jurisdiction of the Court, a decree of foreclosure was obtained against the parties before the Court; and if there is no estate of inheritance, the tenant for life will suffice (*k*).

Where a mortgagor had settled the equity of redemption, it was held that the trustees of a term for raising portions were necessary parties (*l*).

Trustees of term.

The trustee in bankruptcy is the proper party in respect of the interest of a bankrupt mortgagor (*m*), even when, in the case of leaseholds, the trustee has not accepted the lease (*n*), unless he has absolutely disclaimed (*o*), or unless the property was *bonâ fide* settled by the mortgagor before his bankruptcy (*p*), and the bankrupt will be bound by a decree made against the trustee.

Trustee in bankruptcy of mortgagor.

A bankrupt mortgagor is an improper party (*q*), even though the trustee disclaim all interest in the equity of redemption (*r*);

Bankrupt mortgagor should not be made party.

(*e*) *Yates* v. *Hambly*, 2 Atk. 237. And see *Gore* v. *Stacpoole*, 1 Dow, 18, 31; *Roscarrick* v. *Barton*, 1 Ch. Ca. 217; *Lloyd* v. *Johnes*, 9 Ves. 37.

(*f*) *Reynoldson* v. *Perkins*, Amb. 564.

(*g*) *Gore* v. *Stacpoole*, *sup.*; *Sutton* v. *Stone*, 2 Atk. 101; *Handcock* v. *Shaen*, Colles, 122.

(*h*) *Gore* v. *Stacpoole*, 1 Dow, 18.

(*i*) *Fishwick* v. *Lowe*, 1 Cox, 411.

(*k*) *Giffard* v. *Hort*, 1 Sch. & L. 408; *Roscarrick* v. *Barton*, 1 Ch. Ca. 217. See *Platt* v. *Sprigg*, 2 Vern. 304.

(*l*) *Anderson* v. *Stather*, 2 Coll. 209.

(*m*) B. A. 1883, ss. 54, 56; *Hanson* v. *Preston*, 3 Y. & C. Ex. 229; *Cash* v. *Belcher*, 1 Ha. 310; *Peake* v. *Gibbon*, 2 R. & My. 354; *Hill* v. *Edmonds*, 5 De G. & S. 603.

(*n*) *Jones* v. *Binns*, 33 Beav. 362; *Metropolitan Bank* v. *Offord*, L. R. 10 Eq. 398.

(*o*) See *ante*, pp. 167, 169.

(*p*) *Steele* v. *Maunder*, 1 Coll. 535.

(*q*) *Lloyd* v. *Lander*, 5 Madd. 282; *Pannell* v. *Hurley*, 2 Coll. 241; *Kerrick* v. *Saffery*, 7 Sim. 318.

(*r*) *Collins* v. *Shirley*, 1 R. & My. 638. *Singleton* v. *Cox*, 4 Ha. 326, is not law. See *Motion* v. *Moojen*, L. R. 14 Eq. 202.

and, if he is made a party, he will be dismissed with costs (*s*). The reason is that during his bankruptcy the mortgagor has no estate or interest in the property, even though the trustee disclaim (*t*); but under the Act of 1883, s. 55, the bankrupt is not disqualified from acquiring an interest in the disclaimed property under a vesting order.

Cases have arisen where an insolvent or bankrupt mortgagor has been made a party where fraud and collusion were charged (*u*); but he cannot be made a party unless a decree can be made against him at the hearing (*x*); nor for discovery alone, nor for discovery and costs (*y*).

Bankruptcy of mortgagor *pendente lite*.

Where a mortgagor becomes bankrupt pending the suit, the trustee in bankruptcy is not bound by a decree for foreclosure in his absence (*z*); but in a similar case, where the trustee disclaimed, and neither mortgagor nor his trustee appeared at the hearing, the mortgagee was held entitled to a judgment for foreclosure absolute against the trustee, and to the ordinary judgment for foreclosure against the mortgagor (*a*).

Subsequent incumbrancers.

A mortgagee who brings an action of foreclosure or sale, whether he is first (*b*), or any subsequent (*c*) incumbrancer, and whether of a legal (*b*) or equitable (*d*) estate, must make every incumbrancer subsequent to himself a party to his suit, inasmuch as subsequent incumbrancers are entitled to redeem and to have their interests protected upon the taking of the accounts (*e*).

So persons interested under a settlement of a puisne mortgage must be made parties (*f*).

With respect to subsequent incumbrances, of which the plaintiff mortgagee receives notice after the commencement of the action, the foreclosure decree will bind the holder of such incumbrance if added as a party, but not otherwise (*g*). Where

(*s*) *Pannell* v. *Hurley*, *sup.*

(*t*) See *Re Mercer and Moore*, 14 Ch. D. 288. See also *Rochfort* v. *Battersby*, 2 H. L. C. 388, 408; *Re Leadbitter*, 10 Ch. D. 388, C. A.

(*u*) *Mackworth* v. *Marshall*, 3 Sim. 368; *King* v. *Martin*, 2 Ves. Jun. 641. But see *Whitworth* v. *Davis*, 1 V. & B. 545; *Lloyd* v. *Lander*, 5 Madd. 282.

(*x*) *Wych* v. *Meal*, 3 P. Wms. 311, n.

(*y*) *Ibid.*; *Weise* v. *Wardle*, L. R. 19 Eq. 171.

(*z*) *Wood* v. *Surr*, 19 Beav. 551.

(*a*) *English* v. *Barlow*, 48 L. T. 188.

(*b*) *Adams* v. *Paynter*, 1 Coll. 530.

(*c*) *Johnson* v. *Holdsworth*, 1 Sim. N. S. 109.

(*d*) *Tylee* v. *Webb*, 6 Beav. 552.

(*e*) See *Graves* v. *Wright*, cit. 1 Dr. & War. 193.

(*f*) *Goldsmid* v. *Stonehewer*, 17 Jur. 199.

(*g*) *Draper* v. *Clarendon*, 2 Vern. 518; *Sherman* v. *Cox*, 3 Rep. in Ch. 84. See 5 Bac. Abr. 102, tit. *Mortgages* [E. 7].

the plaintiff had no notice of a subsequent incumbrance at the date of the decree, it would seem that the subsequent incumbrancer, though not a party to the action, will be bound by the accounts as taken in the action (*h*), but without prejudice to his right to redeem the prior mortgagee after decree on payment of the prior mortgage debt and costs (*i*).

A second mortgagee who is a party to a foreclosure suit by a first mortgagee does not prejudice his right to sue on his covenant by consenting to a foreclosure order in favour of the first mortgagee (*k*).

It has been said that subsequent incumbrancers, of whose charges the plaintiff had no notice, will not be allowed to re-open the accounts upon a general charge of fraud or collusion, if such charge is denied; and that even if fraud or collusion be specifically alleged and proved, they can only unravel the accounts by proving particular errors (*l*). But subsequent incumbrancers, fraudulently introduced by the mortgagor to shield himself from foreclosure, need not be made parties (*m*).

Where a decree for foreclosure had been obtained but not drawn up, and it was discovered that there were puisne mortgagees, leave was given, under R. S. C., Ord. XVI. r. 11, to amend the writ and statement of claim by making the puisne mortgagees defendants (*n*).

Debenture holders.

Where an equity of redemption has been purchased by a joint stock company, which subsequently issues debentures charged on the property subject to the mortgage, all the debenture holders have an interest in the equity of redemption, and must be made parties to a foreclosure action, and not merely some as representing the whole class under Ord. XVI. r. 9 (*o*). Where debentures constitute a floating security subject to a legal mortgage, the debenture holders are necessary parties to a foreclosure action by the mortgagee (*p*). And the Court has declined to decree foreclosure in the absence of a single deben-

(*h*) See *Greswold* v. *Marsham*, 2 Ch. Ca. 170. But see, *contra*, *Morret* v. *Westerne*, 2 Vern. 663.

(*i*) *Lomax* v. *Hide*, 2 Vern. 185; *Godfrey* v. *Chadwell*, 2 Vern. 601; *Morret* v. *Westerne*, 2 Vern. 663.

(*k*) *Worthington* v. *Abbott*, (1910) 1 Ch. 588.

(*l*) *Needler* v. *Deeble*, 1 Ch. Ca. 299; *Cookes* v. *Sherman*, Freem. Ch. 14.

(*m*) *Yates* v. *Hambly*, 2 Atk. 237. See *Smith* v. *Chichester*, 2 Dr. & War. 393, 404.

(*n*) *Keith* v. *Butcher*, 25 Ch. D. 750. See *Att.-Gen.* v. *Corporation of Birmingham*, 15 Ch. D. 423.

(*o*) *Griffith* v. *Pound*, 45 Ch. D. 553.

(*p*) *Wallace* v. *Evershed*, (1899) 1 Ch. 891.

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ture holder (*q*). Unless all the debenture holders are parties the order should be for sale with the approbation of the judge, so as to enable the absent debenture holders to come in in chambers (*r*).

Crown.

If the equity of redemption becomes vested in the Crown by forfeiture, the Attorney-General should be made a party to the foreclosure action (*s*).

Judgment creditors.

The rule is general that all judgment creditors who have perfected their judgments and obtained a charge on the land are necessary parties (*t*).

Judgment creditors who had not issued legal or equitable execution or registered under 27 & 28 Vict. c. 112, were not necessary parties (*u*), although they might acquire a charge before the time fixed by the decree (*x*).

Now under the Land Charges Act, 1900, a judgment creditor is not apparently a necessary party until he has registered the writ or order enforcing the judgment (*y*).

Prior mortgagee in action by puisne mortgagee.

A puisne mortgagee may bring an action for foreclosure (*z*) or for sale (*a*) against all subsequent incumbrancers as well as the mortgagor, without making the prior mortgagee a party; but he must offer to redeem the prior incumbrancer (*b*). A second mortgagee cannot foreclose where the first mortgagee has been in possession for the statutory period (*c*).

Where there are successive incumbrancers, the puisne incumbrancers must redeem those prior to them or be foreclosed (*d*).

It seems, however, that subsequent mortgagees suing for an account and declaration of priority in their favour have a right to the presence of a prior mortgagee if the rights of the parties cannot be settled in his absence (*e*).

(*q*) *Re Continental Oxygen Co.*, (1897) 1 Ch. 511.
(*r*) *Re Crigglestone Coal Co.*, (1906) 1 Ch. 523.
(*s*) *Lutwyche* v. *Att.-Gen.*, cit. 2 Atk. 223; *Pawlett* v. *Att.-Gen.*, Hard. 465.
(*t*) *Adams* v. *Paynter*, 1 Coll. 530; *Harrison* v. *Pennell*, 4 Jur. N. S. 682.
(*u*) *Earl of Cork* v. *Russell*, L. R. 13 Eq. 210.
(*x*) *Ibid.* See *Mildred* v. *Austin*, L. R. 8 Eq. 220.
(*y*) 63 & 64 Vict. c. 26, s. 2.
(*z*) *Rose* v. *Page*, 2 Sim. 472; *Richards* v. *Cooper*, 5 Beav. 304; *Slade* v. *Rigg*, 3 Ha. 78.
(*a*) *Delabere* v. *Norwood*, 3 Swanst. 144, n.; *Parker* v. *Fuller*, 1 R. & My. 656.
(*b*) *Inman* v. *Waring*, 3 De G. & S. 729.
(*c*) *Johnson and Sons* v. *Brock*, (1907) 2 Ch. 533.
(*d*) See *Whitbread* v. *Lyall*, 8 De G. M. & G. 383; *Moore* v. *Morton*, W. N. (1886) 196; *Webster* v. *Patteson*, 25 Ch. D. 626.
(*e*) *Feltham* v. *Clark*, 1 De G. & S. 307.

Under the general rule, "*pendente lite nihil innovetur*," the assignee, pending an action for foreclosure, cannot have greater rights than his assignor (*f*).

Assignees *pendente lite*.

The decree will accordingly be binding on all creditors, by mortgage or judgment (*g*), and on assignees of the equity of redemption (*h*), subsequent to the action (*i*); and such persons need not generally be made parties unless for the purpose of getting hold of the legal estate (*k*). The rule applies equally to the assignees of plaintiffs and defendants (*l*).

An assignee of an incumbrancer, party to the suit, after a decree, cannot bring an action to redeem and foreclose against the other parties to the suit, though as against the assignor the action will not be dismissed, and the assignee will be decreed to stand in his place in the former suit (*m*).

An assignment *pendente lite* not disclosed does not amount to fraud (*n*); and the assignee may be made a party after decree (*o*).

Assignees *pendente lite* can be brought before the Court by order under the Rules of the Supreme Court (*p*).

Section II.

Jurisdiction in Actions for Foreclosure.

Assignment to Chancery Division.

i.—General Jurisdiction.—By the Judicature Act, 1873 (*q*), actions for foreclosure are assigned to the Chancery Division of the High Court of Justice.

Jurisdiction of County Courts.

By the County Courts Act, 1888 (*r*), the County Courts have jurisdiction in all actions for foreclosure where the mortgage

(*f*) Co. Lit. 102 b; *Metcalf* v. *Pulvertoft*, 2 V. & B. 200; *Trye* v. *Earl of Aldborough*, 1 Ir. Ch. R. 666. As to this rule, see *ante*, p. 653; as to its application in actions for redemption, see *ante*, p. 752.

(*g*) *Bishop of Winchester* v. *Beavor*, 3 Ves. 315; *Bishop of Winchester* v. *Paine*, 11 Ves. 198. See *Re Parbola*, (1909) 2 Ch. 437.

(*h*) *Garth* v. *Ward*, 2 Atk. 175. And see 11 Ves. 199.

(*i*) *Bishop of Winchester* v. *Paine*, *sup.*, which case overrules *Crisp* v. *Heath*, 7 Vin. Abr. 52.

(*k*) 1 Dan. Ch. Pr. (7th ed.) 218; *Daly* v. *Kelly*, 4 Dow, 437.

(*l*) *Eades* v. *Harris*, 1 Y. & C. C. C. 234.

(*m*) *Booth* v. *Creswicke*, 8 Sim. 352.

(*n*) *Patch* v. *Ward*, L. R. 3 Ch. 203.

(*o*) *Campbell* v. *Holyland*, 7 Ch. D. 166.

(*p*) Ord. XVII. r. 4; Ord. XVI. r. 11.

(*q*) 36 & 37 Vict. c. 66, s. 34 (3).

(*r*) 51 & 52 Vict. c. 43, s. 67.

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or charge does not exceed 500*l.* in amount, and also where the mortgage is for more than 500*l.* but less than that sum is actually advanced (*s*).

Concurrent jurisdiction of Chancery Division.

But the Act does not in any way prohibit or restrict a plaintiff, whose charge is for less than that amount, from suing in the High Court; and, if he do so, he will generally be entitled to the usual costs of a mortgagee suing in that Court (*t*); but where the plaintiff and defendant in a foreclosure action both lived at the same place, the plaintiff was allowed only such costs as he would have obtained in the County Court (*u*).

Subject-matter less than 10*l.*

The High Court will not, however, entertain an action or other proceeding to enforce a charge not exceeding 10*l.* in amount (*x*).

In what County Court action may be brought.

An action for foreclosure brought in a County Court must be commenced, where both the mortgagee and mortgagor dwell or carry on business within one or more of the metropolitan districts, either in the district in which the mortgagee dwells or carries on business, or in that in which the mortgagor dwells or carries on business (*y*). Elsewhere in England and Wales the action must be commenced in the Court within the district of which the lands, tenements, or hereditaments, or any part thereof, are situate (*z*).

Jurisdiction not affected by bankruptcy of mortgagor.

The jurisdiction of the Chancery Division is not affected by the mere fact that the mortgagor has become bankrupt. The rule is that where the trustee claims only the same right, the Court of Bankruptcy is not the proper Court to dispose of an action for foreclosure; but where the trustee, by the operation of the law of bankruptcy, has a higher and better title than the bankrupt himself, the action will be transferred into the King's Bench Division to be tried in bankruptcy (*a*).

So, also, the bankruptcy of the mortgagor does not affect the jurisdiction of the County Court to order foreclosure (*b*).

Jurisdiction of Bankruptcy Court.

It seems that the Court of Bankruptcy has no power to make

(*s*) *Shields, Whitley, &c. Bldg. Soc.* v. *Richards,* W. N. (1901) 106.

(*t*) *Brown* v. *Rye,* L. R. 17 Eq. 343. But see *Shields, Whitley, &c.* v. *Richards, sup.*

(*u*) *Symons* v. *MacAdam,* L. R. 6 Eq. 324; *Crozier* v. *Dowsett,* 31 Ch. D. 67.

(*x*) *Westbury* v. *Meredith,* 30 Ch. D. 387, C. A.

(*y*) 51 & 52 Vict. c. 43, s. 84. See *Reg.* v. *Bloomsbury County Court,* 24 Q. B. D. 309.

(*z*) 51 & 52 Vict. c. 43, s. 75.

(*a*) *Re Champagnè, Exp. Kemp,* 69 L. T. 763; *Re Pollard,* (1903) 2 K. B. 41, C. A.

(*b*) *Medhurst* v. *Golder,* 16 L. T. N. S. 50.

an order for foreclosure unless the parties submit to the jurisdiction (*c*).

ii.—**Jurisdiction to order Sale instead of Foreclosure.** In Ireland, it has long been the practice, instead of a foreclosure, to pray that the estate may be sold, and the moneys applied in satisfaction of the incumbrances, and the surplus paid to the mortgagor (*d*). If there is a deficiency, the mortgagee has his remedy for the difference. And this practice has been adopted in several British colonies.

Sale instead of foreclosure in Ireland and in the colonies.

Where, therefore, the mortgaged estate is situate in Ireland or the colonies, and a suit is instituted in the English Courts by the mortgagee, the proper course is to pray a sale (*e*).

When a mortgagee of an estate in the colonies has obtained a decree for a sale in the English Courts, whether right or wrong, he must do whatever is requisite on his part to prevent the colonial Court proceeding to sale (*f*).

Before the passing of the Chancery Amendment Act (*g*), a mortgagee could not in general have obtained a sale of the mortgaged estate. There were, however, several cases in which he could, even in England, have done so; as if the mortgage were of a dry reversion (*h*), or of an advowson (*i*). The mortgagee, both of an advowson (*k*) and of a reversion (*l*), was entitled to foreclose or sell.

Inherent jurisdiction to order sale in certain cases.

So a sale might be had of stock (*m*), or of chattels (*n*), or of a policy of insurance (*o*), unless there was a trust to apply the policy moneys when received, in which case the mortgagee must wait till the death of the mortgagor (*o*). And a sale was the proper remedy where the mortgagor was himself one of the executors of the mortgagee (*p*).

Sale of stock, chattels, &c.

(*c*) *Post*, p. 1116.
(*d*) *McDonough* v. *Shewbridge*, 2 Ba. & Be. 555; *Wilson* v. *Dunsany*, 18 Beav. 293.
(*e*) *Beckford* v. *Kemble*, 1 S. & St. 15; *Gordon* v. *Horsfall*, 5 Moo. P. C. 393.
(*f*) *Willink* v. *Bentinck*, 1 C. P. Coop. t. Cottenham, 288.
(*g*) 15 & 16 Vict. c. 86, s. 48.
(*h*) *How* v. *Vigures*, 1 Rep. in Ch. 18.
(*i*) *Mackenzie* v. *Robinson*, 3 Atk. 559.
(*k*) *Long* v. *Storie*, 3 De G. & S. 308.
(*l*) *Slade* v. *Rigg*, 3 Ha. 35; *Wayne* v. *Hanham*, 9 Ha. 62.
(*m*) *Tucker* v. *Wilson*, 1 P. Wms. 261; *Lockwood* v. *Ewer*, 2 Atk. 303; *Deverges* v. *Sandeman & Co.*, (1902) 1 Ch. 579, C. A.
(*n*) *Kemp* v. *Westbrook*, 1 Ves. Sen. 278; *S. C.*, Belt's Supp. 141; *Pigot* v. *Cubley*, 10 Jur. N. S. 318; *Stubbs* v. *Slater*, (1910) 1 Ch. 632.
(*o*) *Dyson* v. *Morris*, 1 Ha. 422.
(*p*) *Lucas* v. *Seale*, 2 Atk. 56; *Tennant* v. *Trenchard*, L. R. 4 Ch. 537.

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Sale in cases not within Locke King's Act.

Before Locke King's Act (*q*), if a person was both devisee of the mortgaged estate and personal representative of a deceased mortgagor, and admitted in his answer that the personal estate was deficient for payment of debts, a sale might have been obtained in the first instance, without a reference for an account of the personal estate (*r*).

Recovery of arrears of annuity by sale.

Arrears of rent-charges and annuities charged on land may, in a proper case, be recovered by sale of the land charged (*s*); although there are powers of distress and entry (*t*); certainly where there is nothing to distrain upon, and no other means of satisfying the rent-charge or annuity (*t*); but not if there is a term (*u*) or, it would seem, where there is sufficient to distrain upon (*x*).

Where the property charged was subject to a settlement, and no person seised in fee simple in possession, a sale was refused, as the arrears might be satisfied out of the future rents (*y*).

Where settled land has been sold, arrears of a jointure rent-charge charged thereon may be paid out of the proceeds of sale without prejudice to the question whether the charge will ultimately fall on capital or income (*z*).

Statutory jurisdiction to order sale in lieu of foreclosure.

The Chancery Amendment Act, s. 48, which enabled the Court to sell in a foreclosure suit, is repealed by sect. 25 of the Conveyancing Act, 1881 (*a*), which, in effect, enacts that in any action for foreclosure the Court, on the request of the mortgagee, or of any person interested, and notwithstanding the dissent or non-appearance of any other person, and without allowing time for redemption, may direct a sale on such terms as it thinks fit, including the deposit in Court of a sum to meet the expenses of sale and to secure performance of the terms.

Jurisdiction not affected by power of sale.

The fact that the mortgagee might have sold the property in exercise of a power of sale will not prevent the mortgagee from applying for, or the Court from making an order for, sale (*b*),

(*q*) See *ante*, p. 792.

(*r*) See *Daniel* v. *Skipwith*, 2 Bro. C. C. 155.

(*s*) *Horton* v. *Hall*, L. R. 17 Eq. 437; *Scottish Widows' Fund* v. *Craig*, 20 Ch. D. 208; *Northern Assurance Co.* v. *Harrison*, W. N. (1889) 74.

(*t*) *White* v. *James*, 26 Beav. 191; *Hall* v. *Hurt*, 2 J. & H. 76; *Dawson* v. *Robins*, 2 C. P. D. 37, 40, 42.

(*u*) *Blackburne* v. *Hope-Edwardes*, (1901) 1 Ch. 419.

(*x*) *Kelsey* v. *Kelsey*, L. R. 17 Eq. 495.

(*y*) *Graves* v. *Hicks*, 11 Sim. 536.

(*z*) *Re Duke of Manchester's Settlement*, (1910) 1 Ch. 106.

(*a*) 44 & 45 Vict. c. 41. As to the power of the Court to order sale in redemption actions under this section, see *ante*, p. 753, where sect. 25 is set out in full.

(*b*) *Hutton* v. *Sealy*, 4 Jur. N. S. 450.

and in one case an order was made where the mortgagee stated that he was desirous of exercising his power (*c*).

Equitable mortgagee may obtain order for sale.

An equitable mortgagee by deposit of title deeds, with or without any memorandum of charge or agreement to execute a legal mortgage (*d*), or the holder of any other equitable mortgage or charge (*e*), may obtain an order for sale under this jurisdiction (*f*).

The practice with regard to orders for sale in lieu of foreclosure will be dealt with in a later part of this chapter (*g*).

Section III.

Procedure and Practice in Foreclosure Actions.

Form of indorsement of writ.

i. - **How an Action for Foreclosure must be commenced.**— The Rules of the Supreme Court prescribe a form of indorsement of writs in foreclosure actions, claiming an account of what is due for principal, interest, and costs on the mortgage, and that the mortgage may be enforced by foreclosure or sale (*h*).

Claim for delivery of possession.

Where delivery of possession is sought as well as foreclosure the writ should contain a claim for possession. But in several cases orders for delivery of possession have been made in foreclosure actions, though the writ or summons did not ask for possession (*i*); but in the latter case the order will not be made *ex parte* (*j*).

An action for foreclosure is not now deemed to be an action for recovery of land so as to preclude the plaintiff from including a claim for delivery of possession in his writ (*k*).

Injunction against parting with legal estate.

An equitable mortgagee by deposit of deeds may claim by his writ an injunction to restrain the defendant from parting

(*c*) *Brewer* v. *Square,* (1892) 2 Ch. 111.

(*d*) *Oldham* v. *Stringer,* 51 L. T. 895; *York Union Banking Co.* v. *Artley,* 11 Ch. D. 205. See *Woof* v. *Barron,* W. N. (1873) 71.

(*e*) *Grissell* v. *Money,* 38 L. J. Ch. 312.

(*f*) *Cripps* v. *Wood,* 51 L. J. Ch. 584.

(*g*) See Sect. IV. (v).

(*h*) R. S. C. App. A. s. 1 (4).

(*i*) *Salt* v. *Edgar,* 54 L. T. 374; *Best* v. *Applegate,* 37 Ch. D. 43; *Keith* v. *Day,* 39 Ch. D. 452; *Lacon* v. *Tyrell,* W. N. (1887) 71. See *Jenkins* v. *Ridgley,* 68 L. T. 671.

(*j*) *Le Bas* v. *Grant,* 64 L. J. Ch. 368.

(*k*) R. S. C. Ord. XVIII. r. 2, set out *ante,* p. 755.

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with or disposing of the legal estate in the property; and on showing sufficient grounds for apprehension that the security is in peril, the Court may grant an interim injunction till motion day *ex parte* (*l*).

Personal payment.

A decree for foreclosure is not equivalent to a judgment for payment (*m*), but the plaintiff may claim that the mortgagor may be ordered personally to pay the amount found due and costs, and in default be foreclosed (*n*).

When a mortgagee is entitled to immediate payment.

A mortgagee claiming by his writ in a foreclosure action personal payment by the mortgagor of what is due on the covenant is entitled, if the amount of debt and interest is proved, admitted, or agreed to, to judgment for immediate payment of the whole amount (*o*); or, otherwise, to an account of what is due to him for principal and interest and to judgment for payment of the amount found due immediately after such amount is certified, unless, in either case, the judge in his discretion gives time for payment (*p*).

Mortgagee in possession.

Immediate payment cannot be claimed where, though the amount due for principal and interest is proved, it does not appear what sums the plaintiff had or might have received as mortgagee in possession (*q*).

Liquidated demand indorsed.

Where a writ claiming foreclosure and personal payment was also indorsed with a claim for a specific sum alleged to be due under the covenant in the mortgage deed, it was held that, the defendant not having appeared, the plaintiff was entitled to sign judgment for the liquidated demand under Ord. XIII. r. 3, but not to an order for foreclosure *nisi* under Ord. XV. (*r*).

Writ specially indorsed.

But a writ indorsed with a claim for the amount due under the covenant, and for foreclosure, is not a writ specially indorsed within the meaning of Ord. III. r. 6, so as to entitle the plaintiff to summary judgment under Ord. XIV. r. 1 (*s*).

Subsequent action for liquidated sum.

Where mortgagees commenced an action for foreclosure, claiming in the writ a personal order for payment, it was held

(*l*) *London and County Bank* v. *Lewis*, 21 Ch. D. 490, C. A. See *Spiller* v. *Spiller*, 3 Swanst. 556.

(*m*) *Wilson* v. *Lady Dunsany*, 18 Beav. 293.

(*n*) *Dymond* v. *Croft*, 3 Ch. D. 512.

(*o*) *Instone* v. *Elmslie*, 54 L. T. 730.

(*p*) *Farrer* v. *Lacy, Hartland & Co.*, 31 Ch. D. 42, C. A. See *Greenough* v. *Littler*, 15 Ch. D. 93; *Faithfull* v. *Woodley*, 43 Ch. D. 287.

(*q*) *Brooking* v. *Skewis*, W. N. (1887) 250; 58 L. T. 73.

(*r*) *Bissett* v. *Jones*, 32 Ch. D. 635.

(*s*) *Imbert Terry* v. *Carver*, 34 Ch. D. 506. See *Hill* v. *Sidebottom*, 47 L. T. 224.

that they could not, while that action was pending, obtain an order for immediate judgment under Ord. XIV. in a second action commenced by them against the mortgagor, indorsing their writ for a definite sum, being the amount of arrears of interest due on the mortgage (*t*); and this is so although the writ in the foreclosure action contains no claim for payment of principal and interest (*u*).

Claim for liquidated sum after appointment of receiver.

The mere fact that a receiver has been appointed will not of itself prevent the writ being specially indorsed for the amount of principal and interest due under the covenant in a mortgage deed so as to enable the plaintiff to obtain an order under Ord. XIV.; but such an order will not be made if there is any question as to the amount which has come into the hands of the receiver (*x*).

Extent of relief limited to claim in writ.

Where the writ claimed an account, foreclosure, and the appointment of a receiver, and the mortgagor not having appeared to the writ, the mortgagee delivered a statement of claim asking, in addition to the relief claimed by the writ, personal payment by the mortgagor pursuant to his covenant contained in the mortgage; it was held that the provisions of Ord. XX. r. 4, that a plaintiff may, by his statement of claim, extend his claim without amending the writ, did not apply so as to enable him to obtain judgment in default of appearance for more than he had claimed by the writ (*y*).

What costs will be allowed.

Where personal payment is claimed in an action for foreclosure, the costs will be limited to such costs only as would have been incurred if action had been brought for personal payment of the debt only (*z*).

Summons for directions.

It seems doubtful whether the Court has power on a summons for directions to make an order for foreclosure; but if such an order is made and no objection is raised in chambers, the objection cannot afterwards be taken (*a*).

Originating summons for foreclosure.

By Ord. LV. r. 5A of the Rules of the Supreme Court, any mortgagee, whether legal or equitable, or any person having the right to foreclose any mortgage, whether legal or equitable, may

(*t*) *Earl Poulett* v. *Viscount Hill*, (1893) 1 Ch. 277, C. A.

(*u*) *Williams* v. *Hunt*, (1905) 1 K. B. 512.

(*x*) *Lynde* v. *Waithman*, (1895) 2 Q. B. 180, C. A. See *Earl Poulett* v. *Viscount Hill*, *sup.*

(*y*) *Gee* v. *Bell*, 35 Ch. D. 160. See *Kingdon* v. *Kirk*, 37 Ch. D. 141.

(*z*) *Farrer* v. *Lacy, Hartland & Co.*, 31 Ch. D. 42, C. A. See *Dymond* v. *Croft*, 3 Ch. D. 512; *Bissett* v. *Jones*, 35 Ch. D. 635.

(*a*) *Horton* v. *Bosson*, 80 L. T. 435, C. A.

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take out, as of course, an originating summons, returnable in the chambers of a judge of the Chancery Division, for sale, foreclosure, and delivery of possession by the mortgagor.

Proceedings by a mortgagee for sale, foreclosure, and delivery of possession should generally be so commenced, under pain of the costs of an action being disallowed (*b*).

An order for foreclosure or sale can be made, at the instance of debenture holders of a joint stock company, on originating summons (*c*). It is not, however, usual in practice to make such orders on summons.

Receiver.

The originating summons may also ask for the appointment of a receiver (*d*); or a receiver may be appointed on motion in a foreclosure action commenced by originating summons (*e*).

Determination of priorities.

But the Court has apparently no jurisdiction to decide on originating summons a question of priorities between several incumbrancers (*f*); nor to decide disputed questions of fact (*g*).

Claim for personal payment.

If it is desired to claim personal payment by the mortgagor, it would seem that the action must still be commenced by writ of summons (*h*).

Service out of jurisdiction.

Service of an originating summons out of the jurisdiction cannot be ordered (*i*) except under Ord. XI. r. 8A (*k*); if, therefore, a necessary defendant is out of the jurisdiction, the action for foreclosure must be commenced by writ.

Statement of claim for personal payment.

ii.—Pleadings in Action for Foreclosure or Sale.—Where an order for personal payment against the mortgagor is claimed, the statement of claim must set out the mortgagor's covenant for payment of the mortgage debt; where such statement was omitted, the usual decree for foreclosure was made, but without any order for personal payment against the mortgagor (*l*). And

(*b*) *O'Kelly* v. *Culverhouse*, W. N. (1887) 36.

(*c*) *Oldrey* v. *Union Works*, 72 L. T. 627; see also *Sadler* v. *Worley*, (1894) 2 Ch. 170.

(*d*) *Barr* v. *Harding*, 36 W. R. 216; *Johnson* v. *Evans*, 60 L. T. 69; *Oldrey* v. *Union Works*, *sup.*

(*e*) *Weston* v. *Levy*, W. N. (1887) 76. See *Gee* v. *Bell*, 35 Ch. D. 160; *Robson* v. *Horner*, W. N. (1893) 100.

(*f*) *Re Giles, Real and Personal Advance Co.* v. *Mitchell*, 43 Ch. D. 491, C. A.

(*g*) *Beamish* v. *Whitney*, (1908) 1 Ir. R. 38.

(*h*) *Brooking* v. *Skewis*, 58 L. T. 73. But see *Barr* v. *Harding*, W. N. (1887) 251.

(*i*) *Busfield, Re, Whaley* v. *Busfield*, 32 Ch. D. 123; *Re Bullen Smith, Berners* v. *Bullen Smith*, 57 L. T. 924.

(*k*) *Ante*, p. 756.

(*l*) *Wethered* v. *Cox*, W. N. (1888) 165. See *Law* v. *Philby*, 56 L. T. 230; *Faithfull* v. *Woodley*, 43 Ch. D. 287.

conversely, a mortgagee cannot, by claiming personal payment in his statement of claim, enlarge the scope of a writ not endorsed with such a claim (*m*).

Possession of mortgagee must be stated.

If a mortgagee, who is in possession, suppresses the fact in his pleadings, and it turns out, on the account, that nothing was due to him, he will be ordered to pay the costs of the defendant (*n*).

Statement of material facts.

The defendant mortgagor must in his defence set out all facts and state all documents of title on which he relies (*o*).

The mortgagor must plead, or bring to the attention of the Court, before the usual order for foreclosure is made, any special circumstance or fact affecting the amount due from him to the mortgagee; otherwise such circumstance or fact cannot afterwards be raised on taking the accounts (*p*).

Denial of mortgagee's accounts.

Where the mortgagor sets up in his defence a denial and contradiction of the accounts on which the plaintiff's claim is founded, leave to defend ought, as a general rule, to be granted without payment into Court (*q*).

Inquiry as to possession of mortgagee.

Where the mortgagor by his defence suggests that the mortgagee has been in possession, and in receipt of the rents and profits, it is usual for the Court, though a matter of discretion, to grant an inquiry as to that fact (*r*).

Counterclaim by company in liquidation.

Where in a debenture holder's action the company counterclaimed, upon the consequent winding-up of the company it was ordered that the company find some person to give security for costs or have the counterclaim struck out (*s*).

Although a decree of foreclosure on a mortgage security is a matter of common right, yet the Court will refuse it in case of fraud (*t*). The defence of fraud, if set up, must be raised by the pleadings (*u*).

It is a good defence to a foreclosure action that the mortgagee's right to foreclose is barred by lapse of time, but such defence must be expressly pleaded (*x*).

(*m*) *Law* v. *Philby* (No. 2), 56 L. T. 522.

(*n*) *Binnington* v. *Harwood*, T. & R. 477.

(*o*) *Sutcliffe* v. *James*, 27 W. R. 750.

(*p*) *Sanguinetti* v. *Stuckey's Banking Co.*, (1896) 1 Ch. 502. See as to accounts, *post*, Chap. LIV.

(*q*) *Strong* v. *Carlyle Press* (No. 2), W. N. (1893) 51.

(*r*) *Dobson* v. *Lee*, 1 Y. & C. C. C. 714.

(*s*) *Wallingford* v. *Mutual Soc.*, 5 App. Ca. 685.

(*t*) *Saunders* v. *Dehew*, 2 Vern. 271; *Edwards* v. *Martin*, 25 L. J. Ch. 284. See 5 Bac. Abr. 101.

(*u*) R. S. C. Ord. XIX. r. 15.

(*x*) See *post*, Chap. L.

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iii.—**Evidence.**—The Court never gives relief to a mortgagee or bars the equity of redemption, unless the mortgage deed be either admitted or proved (*y*).

Evidence of the security.

If, however, the defendant does not appear, or puts in no defence, this will be taken as an admission of the facts set forth in the statement of claim, and an affidavit of the facts may be dispensed with (*z*).

Proof of mortgage deed at hearing.

The mortgage deed may be proved at the hearing, where the validity, and not the execution or authenticity, thereof is contested (*a*). But where the validity of the mortgage deed and the payment of the consideration are contested by a stranger to the deed, it must be proved by the attesting witness (*b*). If the attesting witness becomes entitled to the mortgage, proof of his handwriting will suffice (*c*).

Loss of mortgage deed.

In case of the loss of the security, it can be established by secondary evidence, and by proof of its existence as a security (*d*).

Evidence of consideration.

Where the consideration is not put in issue, proof of the deed will suffice (*e*). It was held at common law that the mortgagor could not be called to prove the execution (*f*); but now the Chancery rule which admits admissions will prevail (*g*).

Entries against interest.

Entries in the books of the deceased solicitor of the defendant in a foreclosure suit are admitted as evidence for the mortgagee, the plaintiff, to prove that the whole sum agreed to be advanced has been paid to the mortgagor, such entries, though not against the interest of the attorney, being made in the usual course of business (*h*).

Mortgagee-solicitor.

Strict evidence of the consideration is required in case of a mortgage to a solicitor by his client (*i*); especially where the mortgage is to secure the balance of a settled account (*k*). So,

(*y*) *Jacobs* v. *Richards*, 5 De G. M. & G. 55; *Smith* v. *Davies*, 28 Ch. D. 650.

(*z*) *Jones* v. *Harris*, W. N. (1887) 10; 55 L. T. 884.

(*a*) *Booth* v. *Creswicke*, 8 Jur. 323, L. C.; *Rowland* v. *Sturgis*, 2 Ha. 520. But see *contra*, *Jones* v. *Griffith*, 14 Sim. 262. And see *Chalk* v. *Raine*, 7 Ha. 393.

(*b*) *Leigh* v. *Lloyd*, 35 Beav. 455.

(*c*) *Inman* v. *Parsons*, 4 Madd. 271.

(*d*) *Abington* v. *Green*, 14 W. R. 852; *Heath* v. *Crealock*, L. R. 10 Ch. 22.

(*e*) *Piddock* v. *Brown*, 3 P. Wms. 289; *Minot* v. *Eaton*, 4 L. J. Ch. O. S. 134. See *Blackford* v. *Davis*, L. R. 3 Ch. 304.

(*f*) *Whyman* v. *Gath*, 1 C. L. R. 482.

(*g*) Ord. XXXII. And see 17 & 18 Vict. c. 125, s. 26.

(*h*) *Clarke* v. *Wilmot*, 1 Y. & C. C. C. 53.

(*i*) *Lawless* v. *Mansfield*, 1 Dr. & War. 557, 605; *Carter* v. *Palmer*, 1 Dr. & War. 722; *Re Van Laun*, (1907) 2 K. B. 23.

(*k*) See *ante*, p. 629.

also, where the security is impeached on the ground of undue influence (*l*).

Subsequent incumbrances may be proved at the hearing, or an inquiry will be directed (*l*). Subsequent incumbrances.

Where the mortgage is disputed on the ground of lunacy, the fact of lunacy must be tried by a jury or otherwise (*m*). It is not sufficient to prove lunacy at the date of the mortgage; it must be shown that the mortgagee knew and took advantage of the infirmity of the mortgagor (*n*). Lunacy of mortgagor.

The Court will not permit the mortgagor's title to be investigated under proceedings for foreclosure; the Court can only bar the equity of redemption, and leave the mortgagee to pursue his legal means to establish his rights (*o*). Investigation of mortgagor's title.

As a general rule, where, in an action, an account is asked for, it is not the usual practice to give particulars, as to do so would be virtually to anticipate the account which must be taken (*p*). Particulars of accounts.

But, in a foreclosure action, the mere fact that the plaintiff asks for an account is not a sufficient reason to refuse to give particulars. So where in a redemption action the mortgagee alleged that the mortgage comprised, among other things, a sum secured by bills of exchange, and a sum due on open account, and that he had received divers sums in respect thereof, and he counterclaimed for an account and foreclosure or sale, it was held that he must furnish particulars of the sums so received (*q*).

(*l*) *Davis* v. *Parry*, 1 Giff. 174; *Judd* v. *Ollard*, 5 Jur. N. S. 755; *Morgan* v. *Higgins*, 1 Giff. 270; *Melland* v. *Gray*, 2 Y. & C. C. C. 199.

(*m*) *Snook* v. *Watts*, 11 Beav. 105; *Jacobs* v. *Richards*, 5 De G. M. & G. 55. See *Campbell* v. *Hooper*, 3 Sm. & G. 153.

(*n*) *Niell* v. *Morley*, 9 Ves. 478. See *Price* v. *Berrington*, 3 Mac. & G. 486; *Baxter* v. *Earl of Portsmouth*, 5 B. & Cr. 170.

(*o*) *Anon.*, 2 Ch. Ca. 244. See 15 Vin. Abr. tit. Mortgage, 476, pl. 6.

(*p*) *Augustinus* v. *Nerinckx*, 16 Ch. D. 13, C. A.; *Blackie* v. *Osmaston*, 28 Ch. D. 119, C. A.

(*q*) *Kemp* v. *Goldberg*, 36 Ch. D. 505.

Section IV.

Decree Nisi for Foreclosure.

Decree *nisi* always made in first instance.

i.—Form of Decree.—Except by consent, an immediate order for foreclosure absolute is not granted, even though such an order is claimed in the pleadings in the event, which happens, that the defendant makes default in appearance (*r*). For equity, regarding the mortgage as a security only, will always give to the mortgagor time to procure the money before foreclosing him, and will only in the first instance make a judgment *nisi* (*s*).

Common form of decree *nisi*.

The ordinary form of judgment in a foreclosure action, in its simplest form, directs an account to be taken of what is due to the plaintiff under and by virtue of the mortgage, and for the costs of the action, such costs to be taxed, &c.; and that, upon the defendant paying to the plaintiff what shall be certified to be due to him within six months, the plaintiff shall reconvey the mortgaged property free from incumbrances, by him or persons claiming under him, and deliver up all deeds; but that in default of payment within the time fixed the defendant is from thenceforth to stand absolutely debarred and foreclosed of and from all equity of redemption of, in, and to the mortgaged property, with liberty to apply (*t*).

Declaration of charge in favour of mortgagee by deposit.

Where the mortgage is by deposit of title deeds, the decree will declare that the plaintiff is, by virtue of the deposit, entitled to be considered a mortgagee of the hereditaments therein comprised, and will order accounts to be taken, and costs to be taxed, the principal, interest and costs found due to be a charge on the premises, and in default that the defendant shall convey the property to the plaintiff free from all equity of redemption (*u*). In the case of copyholds, the plaintiff will be declared to be entitled to an absolute surrender (*x*).

(*r*) *Patey* v. *Flint*, 48 L. J. Ch. 696.

(*s*) See *Edwards* v. *Cunliffe*, 1 Madd. 287.

(*t*) See Seton on Decrees (7th ed.), p. 1825. For form of decree where the debt is to be paid by instalments, see *Greenough* v. *Littler*, 15 Ch. D. 93; and where a personal judgment is taken on the mortgagor's covenant for payment of principal and interest, see *Lee* v. *Dunsford*, 54 L. J. Ch. 108; *Hunter* v. *Myatt*, 28 Ch. D. 181. For form of decree for foreclosure by consent without account, see *Boydell* v. *Manby*, 9 Ha. App. liii.

(*u*) See the form of decree in *Newton* v. *Aldous*, Seton (7th ed.), p. 1974; *Lees* v. *Fisher*, 22 Ch. D. 283, C. A.

(*x*) *Pryce* v. *Bury*, 2 Drew. 41; L. R. 16 Eq. 153, n.

Where an action by a debenture holder is brought on as a short cause, a declaration of charge will properly be inserted in the judgment, provided the Court is satisfied that the official receiver or liquidator does not object to the validity of the debentures (*y*).

Declaration of charge in debenture holder's action.

Where, on the bankruptcy of the mortgagor, the mortgagee has assessed the value of the security, the decree for foreclosure ought to show on the face of it that the trustee in bankruptcy is entitled to redeem at the valuation, but the subsequent incumbrancers only at the full figure (*z*).

Assessment of security.

Whether the suit be by mortgagor or mortgagee, the price of redemption is the same (*a*). Each party, according as he may be plaintiff or defendant, may be subject to particular equities arising out of those characters, but no distinction is made as to the course and order of redemption between a suit in which the owner is seeking to clear his estate from incumbrances, and that in which the first (*b*) or a subsequent (*c*) mortgagee is seeking to get possession of the estate in satisfaction of his debt.

Price of redemption the same in actions for foreclosure as in actions for redemption.

The form of the decree in foreclosure suits for the redemption of the different incumbrancers is therefore the same as in redemption suits, with the exception that, on failure to redeem, the order in the former suit is for foreclosure, and in the latter for dismissal, which operates as foreclosure (*d*).

ii.—Order for taking the Accounts.—Where the defendant did not appear at the trial, an affidavit of service of notice of trial was dispensed with, and the ordinary judgment *nisi* was made for accounts and foreclosure (*e*).

Order on default of appearance.

It is now well settled that applications for foreclosure can be made under Ord. XV. (*f*), though the jurisdiction has been questioned (*g*). But such applications are not in practice of

Application under Ord. XV.

(*y*) *Marwick* v. *Thurlow*, (1895) 1 Ch. 776; *Parkinson* v. *Wainwright*, 64 L. J. Ch. 493.

(*z*) *Knowles* v. *Dibbs*, 60 L. T. 291.

(*a*) *Du Vigier* v. *Lee*, 2 Ha. 326; *Watts* v. *Symes*, 1 De G. M. & G. 240.

(*b*) *Barnes* v. *Fox*, Seton (6th ed.), p. 1980.

(*c*) *Jackson* v. *Brettall*, Seton (6th ed.), p. 1982.

(*d*) See *ante*, p. 764.

(*e*) *Chorlton* v. *Dickie*, 13 Ch. D. 160; *Baird* v. *East Riding Club and Racecourse Co.*, W. N. (1891) 144.

(*f*) *Smith* v. *Davies*, 28 Ch. D. 650; *Dyott* v. *Neville*, W. N. (1887) 35; *Horton* v. *Bosson*, 80 L. T. 435.

(*g*) *Blake* v. *Harvey*, 29 C. D. 827; *Bissett* v. *Jones*, 32 C. D. 635.

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frequent occurrence as the procedure under Ord. LV. r. 5A is usually adopted.

Right of defendant to insist on plaintiff bringing in the accounts.

Where a mortgagee has obtained an order *nisi* for foreclosure, the defendant mortgagor is entitled to insist on the accounts being carried in, in order that the accounts directed by the decree may be taken, even though it is alleged that the estate is worth less than the amount due on the mortgage (*h*). But in a case where it clearly appeared that the value of the mortgaged property would be quite insufficient to meet the plaintiff's claim, and that the costs of taking the accounts would lead to useless expenses, the defendants having refused to give security for the costs of taking them, the prosecution of the accounts and inquiries directed by the foreclosure order were stayed (*i*).

Master's certificate.

After the account has been taken pursuant to the direction in the judgment, the master makes his certificate of what is due to the plaintiff on his mortgage for principal, interest, and costs up to the day appointed for payment: the certificate is then submitted to the judge for confirmation, and, on default being made in payment, the mortgagee may obtain an absolute order for foreclosure (*k*); the order is afterwards signed, and the foreclosure is complete.

Undertaking by mortgagor to pay amount found due.

If for any reason the judgment to account, instead of being made in the usual manner, proceed upon the undertaking of the mortgagor to pay what shall be found due, the mortgagee, relying upon this undertaking, cannot avail himself of the right to foreclose if default be made in the payment (*l*).

Claim by mortgagor to set off.

If the mortgagor be entitled to set off in matters in respect of which he sues for an account, the Court may give him the benefit of his set off, and may either make one judgment in his suit and in that of the mortgagee, or may give a separate judgment for an account against the mortgagee personally; or upon payment into Court by the mortgagor of the principal and interest, a judgment may be given in both causes, and the foreclosure may be suspended until both accounts have been taken (*m*).

(*h*) *Taylor* v. *Mostyn*, 25 Ch. D. 48, C. A.

(*i*) *Exchange and Hop Warehouses, Ltd.* v. *Association of Land Financiers*, 34 Ch. D. 195; *Lloyds Bank* v. *Colston*, (1912) W. N. 26.

(*k*) *Senhouse* v. *Earl*, 2 Ves. Sen. 450.

(*l*) *Dunstan* v. *Patterson*, 2 Ph. 341.

(*m*) *Dodd* v. *Lydall*, 1 Ha. 333. See *Davis* v. *Whitmore*, 28 Beav. 617.

iii.—Time allowed for Redemption.—To the person entitled to the first right to redeem, it is the practice to give six months from the date of the certificate, which fixes the amount of the debt, and the equitable as well as the legal mortgagor has a right to this time, whether the judgment be for foreclosure or sale (*n*); and although the security be given for a debt which does not carry interest (*o*). But if the mortgagor redeem before the expiration of the six months, he must still pay the full amount of interest found due by the certificate (*p*).

General rule.

The tendency of the Court is to prevent foreclosure suits continuing for years, with successive opportunities for redemption given to the parties. Ordinarily, it gives one period in the first instance, and no more (*q*).

Only one time usually allowed.

Each of the persons entitled to a subsequent right of redemption may, however, if their respective priorities are proved or admitted, be given successively a period of three months from the date of the further certificate, and, in the case of a derivative mortgage, this rule applies to the original mortgagee's right to redeem upon default of redemption by the mortgagor of the original and derivative mortgages (*r*).

But where there are conflicting claims as to priority between several subsequent incumbrancers, the general practice is to grant only one period for redemption (*s*).

Successive periods were granted on the application of a second mortgagee of a reversionary interest, who stated that such interest was valuable and likely to fall in, though the priorities were not admitted or proved (*t*).

Successive redemptions.

In one case, under special circumstances, where the plaintiffs, who were first mortgagees, claimed also as third mortgagees, and there were several subsequent mortgagees, successive periods of redemption were granted on the application of the

(*n*) *Parker* v. *Housefield*, 2 M. & K. 419; *Thorpe* v. *Gartside*, 2 Y. & C. Ex. 730; *Lister* v. *Turner*, 5 Ha. 281, 293; *King* v. *Leach*, 2 Ha. 57; *Lloyd* v. *Whittey*, 17 Jur. 754.

(*o*) *Mellor* v. *Woods*, 1 Keen, 16.

(*p*) *Hill* v. *Rowlands*, (1897) 2 Ch. 361, C. A.

(*q*) Per North, J., in *Smithett* v. *Hesketh*, 44 Ch. D. at p. 164. See *Biddulph* v. *Billiter Street Offices Co.*, W. N. (1895) 98; 72 L. T. 834.

(*r*) *Smithett* v. *Hesketh*, 44 Ch. D. 161.

(*s*) *Bartlett* v. *Rees*, L. R. 12 Eq. 395; *General Credit and Discount Co.* v. *Glegg*, 22 Ch. D. 549; *Smith* v. *Olding*, 25 Ch. D. 462; *Platt* v. *Mendel*, 27 Ch. D. 246; *Lewis* v. *Aberdare & Plymouth Co.*, 53 L. J. Ch. 741; *Doble* v. *Manley*, 28 Ch. D. 664; *Mutual Life Assurance Soc.* v. *Langley*, 32 Ch. D. 460, C. A.; *Tufnell* v. *Nichols*, 56 L. T. 152; *Smithett* v. *Hesketh*, 44 Ch. D. 161.

(*t*) *Bertlin* v. *Gordon*, W. N. (1886) 31.

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plaintiffs, with the concurrence of the other incumbrancers, though the priorities were not admitted as proved (*u*).

Mortgagor not entitled to further time for redemption.

As a general rule, successive periods for redemption will be limited only at the request of the puisne incumbrancers, and not at the request of the mortgagor (*x*), nor of the assignee of the equity of redemption (*y*). In one case, where a foreclosure action was brought on as a short cause on motion for judgment in default of pleading against a second mortgagee, and in default of appearance against the mortgagor, successive periods for redemption were allowed; but this decision appears to be an exception to the usual practice, and is, perhaps, attributable to the special circumstances of the case, which are not reported (*z*).

Prior mortgagee postponing security.

Where a foreclosure action was brought against the mortgagor and a mortgagee who had joined in the plaintiff's mortgage to postpone his own originally prior security, and as surety for the mortgagor, it was held that only one period of six months could be allowed to both defendants (*a*).

Judgment creditors.

Where there are several judgment creditors subsequent to the mortgage, and no intermediate incumbrancers, they will be allowed but one period for redemption; for, otherwise, the process of successive foreclosures of judgment creditors would be interminable (*b*).

In an action for foreclosure by second mortgagees, on evidence that a very small margin would remain for third and fourth mortgagees of the same property after satisfaction of the first and second mortgages, the Court limited one time for all the persons entitled to redeem to do so (*c*).

Creditor obtaining receiver.

Where after a foreclosure order *nisi* a judgment creditor obtained the appointment of a receiver by way of equitable execution in another action, he was entitled to be added as a defendant, but not to an extension of time for redemption (*d*).

(*u*) *Smithett* v. *Hesketh*, 44 Ch. D. 161.

(*x*) *Platt* v. *Mendel*, 27 Ch. D. 246, 248. See *Radcliff* v. *Salmon*, 4 De G. & S. 526; *Mutual Life Soc.* v. *Langley*, 26 Ch. D. 686; *Doble* v. *Manley*, 28 Ch. D. 664.

(*y*) *Re Parbola*, *inf.*

(*z*) *Sweet* v. *Combley*, 25 Ch. D. 463, n.

(*a*) *Smith* v. *Olding*, 25 Ch. D. 462.

(*b*) *Bates* v. *Hillcoat*, 16 Beav. 139; *Stead* v. *Banks*, 5 De G. & S. 560.

(*c*) *Cripps* v. *Wood*, 51 L. J. Ch. 584.

(*d*) *Re Parbola*, (1909) 2 Ch. 437.

Where several puisne incumbrances had been created on the same day, only one period was allowed in respect of them (*e*).

Puisne incumbrances created same day.

So where different persons claimed under the same original puisne mortgagee, some claiming as his sub-mortgagees, and others as entitled under his will to the equity of redemption in the sub-mortgage, only one period was allowed (*f*).

Persons claiming under puisne mortgagee.

So, also, where several persons are entitled successively to the equity of redemption under the same instrument, as tenant for life and remainderman under a settlement, only one period is allowed (*g*).

Tenant for life and remainderman.

These rules as to time apply to securities not only upon real estate but upon choses in action and other personalty, but not to the case of a mere pledge of chattels or to the falling in of a policy of insurance which constitutes the security.

Rule as to personalty.

Where in an action by a first debenture holder, the plaintiff had obtained an order for sale which proved abortive, an order was made on the application of the plaintiff, with the consent of the other first debenture holders, defendants, staying proceedings for sale, and directing foreclosure in respect of their combined debts, with one period for redemption by the subsequent debenture holders and the company (*h*).

In matters relating to foreclosure, the computation of time is by calendar and not lunar months (*i*).

Meaning of "month."

Where a judgment in a foreclosure action by a first mortgagee against puisne mortgagees and the mortgagor directs successive redemptions, and foreclosures in default of redemption, and a puisne mortgagee makes default and is foreclosed, the person next entitled to redeem must pay subsequent interest on the whole amount due from the puisne mortgagee in default for principal, interest, and costs (*k*).

Computation of interest subsequent to certificate.

After judgment for foreclosure and the certificate finding the amount of interest due up to the time allowed for redemption, the mortgagor cannot redeem at an earlier date on payment of interest up to the date of payment only, but must pay the full amount found due by the certificate (*l*).

(*e*) *Long* v. *Storie*, 23 L. J. Ch. 200.

(*f*) *Loveday* v. *Chapman*, 32 L. T. N. S. 689.

(*g*) *Beevor* v. *Luck*, L. R. 4 Eq. 537.

(*h*) *Welch* v. *National Cycle Co.*, W. N. (1886) 97; 55 L. T. 673.

(*i*) *Anon.*, Barn. Ch. R. 324.

(*k*) *Elton* v. *Curteis*, 19 Ch. D. 49, *sed quære*. See *Eardley* v. *Knight*, 41 Ch. D. 537.

(*l*) *Hill* v. *Rowlands*, (1897) 2 Ch. 361, C. A.

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Separate redemptions of successive mortgages.

Where there are separate redemptions, the second mortgagee, as first assignee of the equity of redemption, acquires the rights of the mortgagor, and he has therefore the first right to redeem upon payment of what is due to the first mortgagee, who, upon such payment, is ordered to convey to the second mortgagee; but, in default of payment, the latter is foreclosed (*m*). The order to foreclose the second mortgagee must be made before the subsequent accounts are taken (*n*). The second mortgagee's right to redeem being thus removed out of the way by foreclosure, an account is taken of the first mortgagee's subsequent interest and costs, such subsequent interest being calculated upon the whole sum found due from the second mortgagee, that is, upon the principal, interest, and costs (*o*), and upon payment thereof with the amount originally found due, the third mortgagee may redeem him, and in default, is foreclosed (*p*); and this process is carried on as to all the successive incumbrancers, until the right of the mortgagor or ultimate owner of the equity of redemption alone remains, when he may, in like manner, redeem, and in default will stand dismissed or foreclosed, as the case may be, and in the latter case the estate remains to the first mortgagee free from all incumbrances.

Where there are several incumbrancers and the mortgagor's suit for redemption is dismissed (which is generally equivalent to foreclosure (*q*)), the last incumbrancer becomes *quasi* mortgagor, and the others become first and subsequent incumbrancers according to their priorities (*r*).

But the judgment also provides for the case of the second incumbrancer redeeming the first, and for subsequent account of what is due to the second incumbrancer, and so on, if there be several incumbrancers; and ultimately the last incumbrancer must be redeemed by the mortgagor, or, in default, he will be dismissed or foreclosed as the case may be.

Derivative or sub-mortgagee.

When the mortgagee has incumbered his mortgage, redemption will be decreed on payment into Court by the mortgagor

(*m*) *Whitworth* v. *Rhodes*, 20 L. J. Ch. 105; *Radcliff* v. *Salmon*, 4 De G. & S. 526; *Cave* v. *Foulks*, 5 L. J. Ch. 206.

(*n*) *Whitbread* v. *Lyall*, 8 De G. M. & G. 383, L.JJ.; *Webster* v. *Patteson*, 25 Ch. D. 626.

(*o*) *Elton* v. *Curteis*, 19 Ch. D. 49.

(*p*) *Bingham* v. *King*, 14 W. R. 414.

(*q*) See *ante*, p. 764.

(*r*) *Cottingham* v. *Earl of Shrewsbury*, 3 Ha. 637.

of the mortgage debt; and upon such payment the mortgagor is entitled to a conveyance from the mortgagee and sub-mortgagee, and delivery of the deeds at once, without waiting for the accounts to be taken between them (*s*). In the case of a derivative mortgage or sub-mortgage, the judgment directs (*t*) an account of what is due to the original mortgagee or his assignee, and then of what is due to the derivative or sub-mortgagee; and that upon payment to the latter of the sum due to him, not exceeding the sum found due to the original mortgagee, and on payment of the residue, if any, of what is due to the original mortgagee, both of them shall reconvey to the mortgagor. In case of default and foreclosure or dismissal, as the case may be, after the computation of the subsequent interest and costs due to the derivative or sub-mortgagee, he is ordered to reconvey on payment of that amount by the original mortgagee, and in default of payment the latter is foreclosed.

Mortgagee part owner of equity of redemption.

Where there are several mortgagees, and the first is also part owner of the equity of redemption, the judgment directs (*u*) that upon payment to the first mortgagee of all that is due to him by the second, the former shall convey the whole estate subject to his right to redeem the part in the equity of redemption whereof he is interested; on default of payment the second mortgagee is foreclosed in the usual manner. The owner of the residue of the equity of redemption redeems on payment of all that is due, but receives a conveyance only of that part in which he is interested. But it is suggested that he ought to have a conveyance of all, subject to the right of the first mortgagee to redeem his share of the equity again upon payment of a proportion, on the principle that the mortgagee must be entirely redeemed or not at all, or that, to avoid such a circuity, the part owner of the equity ought in the first instance to redeem the mortgagee on payment of a sum proportioned to the redeeming party's share. In case of redemption by the second or other subsequent mortgagee, he is redeemable in his turn by the first mortgagee being owner of part of the equity and by the owner of the residue of the equity on payment by

(*s*) *Lysaght* v. *Westmacott*, 33 Beav. 417, L.JJ.

(*t*) *Dalton* v. *Wilson*, Seton (7th ed.), p. 2010. And see *Loat* v. *Thorpe* (12 Jan. 1876, B. 154), *ibid.*

(*u*) See the decrees in *Sober* v. *Kemp*, 6 Ha. 155; *Lloyd* v. *Douglas*, 4 Y. & C. Ex. 448.

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each of a part of the mortgage debt proportioned to his share, and upon redemption the estate is conveyed to them in the proportions in which they are entitled. If the first mortgagee do not make the payment in respect of his share in the equity, the suit in respect thereof is dismissed, and upon the like default by the other owner of the equity he is foreclosed.

Mortgage of distinct parts of estate to different mortgagees.

Where a puisne mortgagee of estates, distinct portions of which have been previously mortgaged to several persons, seeks redemption and to foreclose the mortgagor, he is entitled to a judgment that he may redeem both or either of the estates. If he redeem both, he may foreclose the mortgagor, unless he also redeem both. If he redeem but one, the mortgagor must redeem that one or be foreclosed; and as to that which the plaintiff does not redeem, his suit will be dismissed (*x*).

Inquiry as to priorities.

Where questions arise as to the priorities of several securities, an inquiry will be directed (*y*).

Enlargement of time for payment.

Although the Court, after default by the mortgagor in payment of the debt, will give the mortgagee relief by foreclosure, and in certain instances by sale, yet the Court, in accordance with its principle of considering the estate a security only, will grant the mortgagor every fair allowance of time to enable him to discharge the debt. The time for payment may be, therefore, renewed, on proper application to the Court, even after the decree is signed (*z*); nor will it make a difference that the proceedings are under 7 Geo. II. c. 20, s. 2 (*a*), so that the time may be enlarged in the latter case (*b*).

Grounds for enlargement must be shown.

An order to enlarge the time for payment in a foreclosure suit is not a matter of course, and may be refused where no excuse for the default is stated, or where the security is not shown to be ample (*c*). But in a case where the default in payment by the mortgagor on the day fixed was occasioned by the act of the mortgagee preventing the mortgagor from receiving the rents of the property, the time was enlarged for

(*x*) *Pelly* v. *Wathen*, 7 Ha. 351, 363; app. on another point, 1 De G. M. & G. 16.

(*y*) *Duberly* v. *Day*, 14 Beav. 9. See *Bartlett* v. *Rees*, L. R. 12 Eq. 395.

(*z*) *Anon.*, Barn. 221; *Cocker* v. *Bevis*, 1 Ch. Ca. 61; *Ismoord* v. *Claypool*, 1 Rep. in Ch. 139; *Edwards* v. *Cunliffe*, 1 Madd. 287; *Ford* v. *Wastell*, 2 Ph. 591; *Thornhill* v. *Manning*, 1 Sim. N. S. 451; *Prees* v. *Coke*, L. R. 6 Ch. 649.

(*a*) *Ante*, p. 900.

(*b*) *Wakerell* v. *Delight*, 9 Ves. 36.

(*c*) *Nanny* v. *Edwards*, 4 Russ. 124; *Eyre* v. *Hanson*, 2 Beav. 478; *Jones* v. *Creswicke*, 9 Sim. 304; *Booth* v. *Creswick*, Cr. & Ph. 361.

three months on terms, notwithstanding there was doubt whether the value of the security was ample (*d*).

The time may be enlarged on terms pending an appeal (*e*). Enlargement pending appeal.

Where the mortgagee has received the rents between the certificate and the time fixed for payment, the Court will, on motion, refer it back to chambers to continue the account, or, to save delay, will accept evidence of the exact amount which will be due to the plaintiffs; and in either case will fix a new day (*f*), unless under special circumstances (*g*). Where a mortgagee receives rents, after default has been made, on the day fixed by the order for redemption, but before an affidavit of such default is sworn, an order for final foreclosure will be made without any further account (*h*). Receipt of rents by mortgagee after certificate.

Where, in a foreclosure suit, objections were taken to the certificate, and the time appointed for the payment of the mortgage money was likely to elapse before the objections were heard, it was held that the defendant should have applied to the Court, upon the objections being filed, to have the time enlarged until the objections were disposed of (*i*); the same would apply to the present practice after a summons to vary the certificate. Where objections are made to the certificate.

The condition on which the order for enlargement of time is usually granted, is payment of the interest and costs reported due, on or before the time appointed for the payment of the whole, carrying on the account for subsequent interest and costs (*k*); but in some cases an additional time will be given for the payment of such interest and costs, as where, at the time of the application for enlargement of the redemption time, the time fixed for payment has nearly arrived (*l*), or the mortgagor has been prevented by the mortgagee from receiving the rents (*m*). Three months' enlargement of time Conditions on enlargement.

(*d*) *Geldard* v. *Hornby*, 1 Ha. 251.

(*e*) *Monkhouse* v. *Bedford Corp.*, 17 Ves. 380; *Finch* v. *Shaw*, 20 Beav. 555. See *Renvoize* v. *Cooper*, 1 S. & St. 365.

(*f*) *Garlick* v. *Jackson*, 4 Beav. 154; *Alden* v. *Foster*, 5 Beav. 592; *Ellis* v. *Griffiths*, 7 Beav. 83; *Constable* v. *Howick*, 5 Jur. N. S. 331; *Webster* v. *Patteson*, 25 Ch. D. 626; *Lacon* v. *Tyrell*, 56 L. T. 483; *Jenner-Fust* v. *Needham*, 32 Ch. D. 582, C. A.; *Cheston* v. *Wells*, (1893) 2 Ch. 151. See *post*, p. 1081.

(*g*) *Coleman* v. *Llewellin*, 34 Ch. D. 143, C. A.; *Welch* v. *National Cycle Works*, W. N. (1886) 196; 55 L. T. 673.

(*h*) *National Permanent, &c. Building Soc.* v. *Raper*, (1892) 1 Ch. 54.

(*i*) *Renvoize* v. *Cooper*, 1 S. & St. 364.

(*k*) *Eyre* v. *Hanson*, 2 Beav. 478; *Edwards* v. *Cunliffe*, 1 Madd. 287.

(*l*) *Eyre* v. *Hanson*, *sup.*

(*m*) *Geldard* v. *Hornby*, 1 Ha. 251, *sup.* p. 1068.

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has been granted upon the mortgagor's immediate payment of 5,000*l.*, being half the amount of interest due (*n*).

Costs of application.

A defendant applying for enlargement of time to redeem will be ordered at once to pay the costs of the application (*o*).

Subsequent interest.

After the time has been enlarged, subsequent interest on the principal and unpaid costs only is required, not interest on interest (*p*), unless the computation of subsequent interest on the amount of principal, interest and costs certified to be due is made the terms on which the extension of time is granted (*q*). This rule is adhered to even where the application for enlargement is made on behalf of infants (*r*).

Ability to pay.

In order to obtain an enlargement of time, the applicant must show that there is some probability of his being able to pay the amount due at the end of the extended period (*s*).

Further enlargement.

Although the interest and costs be not paid by the mortgagor on the appointed day, yet if he can give satisfactory reasons for his default, he may obtain a fresh enlargement (*t*). And, under special circumstances, a further enlargement of time was allowed after a final order for foreclosure had been made, but not drawn up (*u*). As a general rule, a further enlargement will not be granted after time has been once enlarged by consent (*x*).

Power of attorney to receive payment.

iv.—Payment under Decree Nisi.—A power of attorney from the mortgagee is generally necessary to enable an agent to receive payment under a decree *nisi* for foreclosure (*y*). But in some cases where a mortgagor has made default in attending at a place and time appointed for payment of the money, foreclosure absolute has been ordered, though the agent of the mortgagee had no power of attorney with him when he attended to receive the money (*z*).

(*n*) *Forrest* v. *Shore*, 32 W. R. 356.

(*o*) *Holford* v. *Yate*, 1 K. & J. 677; *Finch* v. *Shaw*, 20 Beav. 555.

(*p*) *Whitfield* v. *Roberts*, 17 Jur. N. S. 1268; *Wilkinson* v. *Charlesworth*, 2 Beav. 470; *Whatton* v. *Cradock*, 1 Keen, 267.

(*q*) *Brewin* v. *Austin*, 2 Keen, 212; *Bruere* v. *Wharton*, 7 Sim. 483.

(*r*) *Coombe* v. *Stewart*, 13 Beav. 111.

(*s*) *Whatton* v. *Cradock*, 1 Keen, 269; *Brewin* v. *Austin*, 2 Keen, 211; *Coombe* v. *Stewart*, 13 Beav. 111; *Holford* v. *Yate*, 1 K. & J. 677.

(*t*) *Edwards* v. *Cunliffe*, 1 Madd. 287.

(*u*) *Jones* v. *Creswicke*, 9 Sim. 304.

(*x*) *Campbell* v. *Moxhay*, 18 Jur. 641.

(*y*) *Gurney* v. *Jackson*, 1 Sm. & G. App. 26.

(*z*) *Cox* v. *Watson*, 7 Ch. D. 196; *Moore* v. *Horsfield*, W. N. (1882)

Attendance of the mortgagee's solicitor without a power at the time appointed, and of the mortgagee himself during part of the time, was held sufficient (*a*); and even such attendance after the time (*b*).

Payment to joint mortgagees.

Payment of the mortgage money to one of several joint mortgagees is not sufficient (*c*). But in a case where two mortgagees, who were trustees, were living at a distance, payment out of Court was directed to one of them (*d*).

Breach of trust by trustee-mortgagee.

Where a mortgagee-trustee has committed a breach of trust, the Court will restrain him from receiving the mortgage money in a foreclosure suit, but will direct the money to be paid to the solicitor of the *cestuis que trust*, he undertaking to pay it into Court (*e*).

When order for sale may be made.

v.—Order for Sale in lieu of Foreclosure.—Formerly, an order for sale must have been made at the hearing, except by consent (*f*). But under the present practice such order may be made at any stage of the action (*g*). So, the plaintiff, or any person interested in the equity of redemption, may now apply for a sale at any time before the hearing (*h*). And an order for sale may be made even after decree *nisi* for foreclosure and before foreclosure absolute (*i*). So, upon motion by a mortgagee for a decree absolute, a sale was ordered at the instance of the mortgagor, he paying the costs of the motion (*k*).

But a sale will not be ordered where it would benefit neither party and only lead to useless expense (*l*).

Order for immediate sale.

An order for immediate sale will not be made on the application of a mortgagee, except under special circumstances (*m*). Generally, the accounts must first be certified (*n*), and then a

43; *Crawley* v. *Fuller*, W. N. (1890) 35; *King* v. *Hough*, W. N. (1895) 90.

(*a*) *Letchmere* v. *Clamp*, 30 Beav. 218; *S. C.*, 31 Beav. 578.

(*b*) *Barnard* v. *Norton*, 10 L. T. 183.

(*c*) *Matson* v. *Dennis*, 4 De G. J. & S. 345; *Powell* v. *Brodhurst*, (1901) 2 Ch. 160.

(*d*) *Bradford* v. *Nettleship*, 10 W. R. 264.

(*e*) *Snare* v. *Baker*, 13 Jur. 203.

(*f*) *Wayne* v. *Lewis*, 1 Drew. 487; *Campbell* v. *Moxhay*, 18 Jur. 641; *Woodford* v. *Brooking*, L. R. 17 Eq. 425.

(*g*) See 44 & 45 Vict. c. 41, s. 25.

(*h*) *Woolley* v. *Coleman*, 21 Ch. D. 169.

(*i*) *Union Bank* v. *Ingram*, 20 Ch. D. 463, C. A.

(*k*) *Weston* v. *Davidson*, W. N. (1882) 28.

(*l*) *Lloyds Bank* v. *Colston*, (1912) W. N. 26.

(*m*) *Green* v. *Biggs*, W. N. (1885) 128; 52 L. T. 680.

(*n*) *Wade* v. *Wilson*, 22 Ch. D. 235.

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period of from one month to six months, according to the circumstances of the particular case, will be allowed to the mortgagor for redemption (*o*).

Order by consent.

An order for immediate sale may be made with the consent of all parties interested (*p*).

Property of infant.

An immediate sale has been ordered in an action for foreclosure against an infant mortgagor, where the Court has been satisfied on the evidence that such sale would be for the benefit of the infant (*q*).

Grounds for immediate sale.

Such an order may be made notwithstanding the dissent of the mortgagor, if the property is wholly unproductive (*r*); or where the rents are insufficient to keep down the interest (*s*); or if the arrears of interest are considerable (*t*); or on other sufficient grounds, if all parties interested are before the Court (*u*).

Sale before trial.

A plaintiff mortgagee may be entitled to a sale at any time before foreclosure absolute (*x*), even before trial, if he show that there is urgent necessity (*y*). But the Court may direct a sale upon an interlocutory application (*z*).

The sale may be ordered to be made out of Court subject to such terms as to security for costs or otherwise as the Court may direct (*a*).

An order for sale or for foreclosure, if a sale could not be effected, was made at the request of a second mortgagee (*b*). And such an order may be made though the first mortgagee is not a party to the action (*c*).

Purchaser of equity of redemption.

Under sect. 48 of the stat. 15 & 16 Vict. c. 86, leave was given to a purchaser of the equity of redemption, who was a

(*o*) *Whitfield* v. *Roberts*, 5 Jur. N. S. 113; *Green* v. *Biggs*, *sup.*; *Wade* v. *Wilson*, *sup.*; *Jones* v. *Harris*, 55 L. T. 884. See *Charlewood* v. *Hammer*, 28 Sol. Jo. 710 (ten days).

(*p*) *Wigham* v. *Measor*, 5 W. R. 394.

(*q*) *Mears* v. *Best*, 10 Ha. App. li.; *Siffkin* v. *Davis*, Kay, App. xxi.

(*r*) *Foster* v. *Harvey*, 4 De G. J. & S. 59.

(*s*) *Phillips* v. *Gutteridge*, 4 De G. & J. 531.

(*t*) *Smith* v. *Robinson*, 1 Sm. & G. 140; *Newman* v. *Selfe*, 33 Beav. 522.

(*u*) *Marriott* v. *Kirkham*, 3 Giff. 536.

(*x*) *Union Bank* v. *Ingram*, 20 Ch. D. 463; *Weston* v. *Davidson*, W. N. (1882) 28.

(*y*) *Davis* v. *Ashwyn*, 47 L. J. Ch. 70.

(*z*) *Woolley* v. *Coleman*, 21 Ch. D. 169.

(*a*) *Brewer* v. *Square*, (1892) 2 Ch. 111, 118. For form of order, see *Cumberland Union Banking Co.* v. *Cumberland Maryport Iron Co.*, (1892) 1 Ch. 92; Seton, p. 1918.

(*b*) *Saul* v. *Pattinson*, 55 L. J. Ch. 831.

(*c*) *Cripps* v. *Wood*, 51 L. J. Ch. 584.

defendant to the foreclosure action, to apply in chambers for a sale of the property (*d*).

No sale could formerly be had against a mortgagee with a paramount title except with his consent (*e*).

The jurisdiction to order sale in lieu of foreclosure is discretionary.

And now, although the Court may make an order for sale notwithstanding the dissent or non-appearance of any party (*f*), yet such an order is entirely in the discretion of the Court, and will not be made as a matter of course, or without good reasons being shown why such an order should be made instead of the usual foreclosure decree (*g*); *à fortiori*, an order for sale will not be made where the result of a sale might be oppressive to any person interested (*h*). So, where a first mortgagee prayed for foreclosure, an application by second mortgagees for a sale of a building estate then of insufficient value to cover the first mortgage, but alleged to be likely to increase in value, was refused (*i*).

Notice of application for sale.

Where foreclosure only was claimed, the Court refused to order a sale of the mortgaged property in the absence of the mortgagor, who had no notice of the application for a sale (*k*).

Order for sale of part of property.

The Court will not necessarily make an order for the sale of the whole mortgaged property, but may limit the operation of the order to so much as will be sufficient to satisfy the amount found due on the mortgage (*l*).

Deficiency of security.

Lord Hardwicke seems to have thought that deficiency in point of value of the security was a sufficient ground for making an order for sale (*m*).

Estate of deceased mortgagor.

It seems that a sale will generally be ordered where the action is brought against the representatives of a deceased mortgagor (*n*), in which case the mortgagee will be entitled to his costs against the representatives (*o*).

Public undertaking.

A sale of an undertaking which is of public benefit cannot

(*d*) *Greenough* v. *Littler*, 15 Ch. D. 93.

(*e*) *Langton* v. *Langton*, 7 De G. M. & G. 30.

(*f*) See *Wade* v. *Wilson*, 22 Ch. D. 235.

(*g*) *Heath* v. *Crealock*, L. R. 10 Ch. 22; *Merchant Banking Co.* v. *London, &c.*, 55 L. J. Ch. 479. See *Wickham* v. *Nicholson*, 19 Beav. 38; *Provident Clerks' Life Assur. Assoc.* v. *Lewis*, 62 L. J. Ch. 89.

(*h*) *Hurst* v. *Hurst*, 16 Beav. 372.

(*i*) *Merchant Banking Co. of London* v. *London and Hanseatic Bank*, 55 L. J. Ch. 479.

(*k*) *South Western District Bank* v. *Turner*, 31 W. R. 113.

(*l*) *Wade* v. *Wilson*, 22 Ch. D. 235.

(*m*) *Kinnoul* v. *Money*, 3 Swanst. 208, n. See *Dashwood* v. *Bithazay*, Mos. 196.

(*n*) *Brocklehurst* v. *Jessop*, 7 Sim. 438.

(*o*) *Connell* v. *Hardie*, 3 Y. & C. Ex. 582.

generally be made except under the authority of an Act of Parliament (*p*). But North, J., at the instance of debenture holders of a tramways company, made an order for the sale of the undertaking on the ground that, by sect. 44 of the Tramways Act, 1870, which was incorporated with the special Act, the company itself was empowered to sell its undertaking (*q*). A mortgage of a volunteers' drill-hall has been enforced by sale (*r*).

Where land is mortgaged with stock or other personal chattels, the proper order is a sale of the stock or personal chattels in the first instance, and the usual foreclosure decree as to the land for the deficiency, otherwise the foreclosure may be re-opened (*s*).

In case of a mortgage of a policy, a trust being declared of the policy moneys, but no right to sell the policy given, upon the death of the assured the judgment is simply for payment of the mortgage debt out of the policy moneys; but in a suit before such death the only remedy seems to be foreclosure (*t*).

Order for sale does not stay proceedings on personal judgment.

Where, in a foreclosure action, a mortgagee had obtained a personal judgment for payment of the mortgage debt, and a decree *nisi* for foreclosure, with liberty to apply for a sale, it was held that a subsequent order for sale was not equivalent to a stay of execution on the personal judgment, so as to prevent a bankruptcy notice from issuing thereon (*u*).

Power to order sale free from incumbrances.

According to the former practice, where an order was made for sale in lieu of foreclosure, the sale was ordered to be made free from the securities of such incumbrancers as concurred, but subject to the securities of such incumbrancers as did not concur (*x*). The Court may now (*y*) direct the applicant to lodge in Court the amount required to meet the amount due to dissenting incumbrancers, and declare the lands free from their charges upon such lodgment (*z*).

Deposit in Court to meet expenses, &c.

Where a mortgagee objects to a sale, the Court may order the applicant to deposit in Court also a sufficient amount to cover

(*p*) *Blaker* v. *Herts and Essex Water Co.*, 41 Ch. D. 399; *Re Barton-on-Humber Water Co.*, 42 Ch. D. 585.

(*q*) *Bartlett* v. *West Metropolitan Tramways Co.*, (1894) 2 Ch. 286.

(*r*) *Grissell* v. *Money*, 38 L. J. Ch. 312.

(*s*) *Ante*, p. 1036.

(*t*) *Dyson* v. *Morris*, 1 Ha. 413.

(*u*) *Re Kelday, Exp. Meston*, W. N. (1888) 94; 36 W. R. 585.

(*x*) *Wickenden* v. *Rayson*, 6 De G. M. & G. 210; *Ward* v. *Mackinlay*, 2 De G. J. & S. 358.

(*y*) 44 & 45 Vict. c. 41, s. 5, set out *ante*, p. 655.

(*z*) See *Woolley* v. *Coleman*, 21 Ch. D. 169.

the probable expenses of an abortive sale, and may fix a reserve price sufficient to cover the amounts due to the dissenting mortgagees (*a*).

Conduct of sale.

The conduct of the sale in a foreclosure action, as in a redemption action, is a matter for the discretion of the Court (*b*). In the former case, however, it would appear that, as a general rule, the conduct will be given to the first mortgagee whether legal or equitable, if he insists upon it, especially if the security appears to be insufficient (*c*). But the Court has given the conduct of the sale to a fourth mortgagee on giving security, notwithstanding the objection of the first mortgagee (*d*). And, in the absence of objection, the conduct has been given to the mortgagor, as being the person whose interest it was to obtain the best price (*e*); but the mortgagor may be required to deposit in Court a sum sufficient to meet the costs of the sale (*f*), or to give security for such costs if there is any doubt that the proceeds of sale will be sufficient to meet them (*g*).

The Court will not give the conduct of sale to the mortgagor on the allegation that he can sell to greater advantage than the mortgagee. If the mortgagor wants the control he must redeem. The mortgagor has no equity to interfere with the mortgagee's right to sell (*h*).

Sale out of Court.

A sale may be ordered to be made altogether out of Court by consent, but the purchase-money will be ordered to be paid into Court (*i*). A sale altogether out of Court will not be ordered unless the Court is satisfied that all persons interested in the property to be sold are before the Court.

Biddings.

The reserved biddings and other matters relating to the sale may be fixed by the judge (*k*).

Where the mortgagee has leave to bid, a reserved bidding is

(*a*) *Whitfield* v. *Roberts*, 5 Jur. N. S. 113; *Bellamy* v. *Cockle*, 18 Jur. 465; *Burmester* v. *Moxon*, 35 Beav. 310; *Witts* v. *Young*, W. N. (1870) 172. See *Corsellis* v. *Patman*, L. R. 4 Eq. 156.

(*b*) *Ante*, p. 766. See *Exp. Harrison, Re Jordan*, 13 Q. B. D. 228.

(*c*) *Hewitt* v. *Nanson*, 28 L. J. Ch. 49; *Christy* v. *Van Tromp*, W. N. (1886) 111.

(*d*) *Norman* v. *Beaumont*, W. N. (1893) 45. See *Re Jordan, Exp. Harrison*, 13 Q. B. D. 228.

(*e*) *Davies* v. *Wright*, 32 Ch. D. 220.

(*f*) *Brewer* v. *Square*, (1892) 2 Ch. 111.

(*g*) *Woolley* v. *Coleman*, 21 Ch. D. 169. See *Davies* v. *Wright*, 32 Ch. D. 220.

(*h*) *Re Longdendale Cotton Co.*, 8 C. D. 150.

(*i*) *Ralph* v. *Horton*, 19 W. R. 220; *Davies* v. *Wright*, *sup.*

(*k*) *Cumberland Union Banking Co.* v. *Maryport Hematite, &c. Co.*, (1892) 1 Ch. 92. See R. S. C. Ord. LI. r. 1 (a).

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fixed (*l*); he will not be given the conduct of the sale (*m*); and he must abandon his right to sell under his power (*n*).

Trustee-mortgagee.

Where the mortgagee has advanced money on the security of an estate of which he is trustee, he will not be allowed to bid at a sale of the mortgaged property directed by the Court, if any of the *cestuis que trust* object (*o*).

Opening biddings.

Formerly, where property in mortgage was sold by the direction of the Court, the biddings were liable to be opened at any time before the report had been confirmed absolute; this period was by statute (*p*) limited to eight days after the certificate of the purchase had been signed by the judge in chambers. Biddings cannot now be opened after a sale by auction or by private contract under the sanction of the Court, unless on the ground of fraud, or misconduct of the sale (*q*).

Liability of mortgagees on sale by Court.

On a sale by mortgagees under an order of the Court in a foreclosure action, the mortgagees are ordinary vendors, and are not liable for the acts of other parties to the action (*r*).

Payment of proceeds of sale into Court.

Where a sale has been ordered in lieu of foreclosure, the sale takes place in default of payment at the appointed time, and the proceeds of sale are paid into Court, with liberty to the parties interested to apply by summons in chambers for distribution of the money amongst the incumbrancers according to their several rights and priorities, and for payment of the surplus, if any, to the ultimate owner of the equity of redemption (*s*).

Application of proceeds of sale.

The proceeds of a sale under the order of the Court will be applied in the same order as in the case of a sale by a mortgagee under his power (*t*).

Costs of mortgagee.

Where a plaintiff mortgagee prays for or assents to a sale in lieu of foreclosure, he does not thereby lose his right to be paid his costs of the action in priority to the defendants (*u*).

Paramount right of first mortgagee to payment in full.

Where a first mortgagee obtains an order for sale in lieu of foreclosure, a puisne incumbrancer concurring in the sale is not

(*l*) *Re Commercial Bank of London*, 9 L. T. N. S. 782, Bkcy.; *post*, p. 1136.
(*m*) *Domville* v. *Berrington*, 2 Y. & C. Ex. 723.
(*n*) *Exp. Davies*, 3 D. & C. 504.
(*o*) *Tennant* v. *Trenchard*, L. R. 4 Ch. 537.
(*p*) 15 & 16 Vict. c. 80, s. 34.
(*q*) 30 & 31 Vict. c. 48, s. 7; *Re Bartlett, Newman* v. *Hook*, 16 Ch. D. 561.
(*r*) *Union Bank* v. *Munster*, 37 Ch. D. 51.
(*s*) Seton, Decrees (7th ed.), p. 1848.
(*t*) See *ante*, pp. 940 *et seq.*
(*u*) *Cook* v. *Hart*, L. R. 12 Eq. 459. See *Pinchard* v. *Fellows*, L. R. 17 Eq. 421.

entitled to any costs until the first mortgagee has been paid in full (*x*).

Payment to subsequent incumbrancers.

The Court may order proceeds of sale to be paid out to incumbrancers upon affidavit of the exact amount due to them without an account (*y*), and the surplus proceeds (if any) to be paid to the mortgagor.

Payment of surplus to mortgagor.

Where by a marriage settlement of land a husband and wife had a joint power of appointment overriding the uses in favour of themselves and their issue, and in exercise of their power they mortgaged the property by deed containing a proviso for reconveyance of the property to the uses of the settlement, and a power of sale with a declaration that surplus proceeds of sale should be paid to the husband, the mortgagee having sold under his power, it was held that there was no resulting trust of the surplus which belonged to the personal representatives of the husband as part of his personal estate (*z*).

Reversion on mortgage term included in sale.

Although the value of the reversion in fee expectant on a mortgage for a long term of years is nominal, yet if, in a foreclosure suit, the fee simple is sold under a decree by consent, the Court will direct a reference, to ascertain the difference in value between the value of the property sold in that way, or as a term, and will give the mortgagor or his representatives the benefit of such difference, as representing value of an interest not included in the mortgagee's security (*a*).

Deficiency in proceeds of sale.

If mortgaged property is sold in a foreclosure action, and the proceeds of sale are insufficient to satisfy what is due on the security, the decree for sale is not a judgment for payment of the balance due after realizing the security so as to constitute the mortgagee a judgment creditor for that amount, but he will be merely a specialty or simple contract creditor for the balance according as the mortgage deed contains or does not contain a personal covenant by the mortgagor for payment of principal and interest (*b*).

Investment of purchase-money, at whose risk.

In case of a sale, the investment of the purchase-money is not at the risk of the mortgagee; his interest still runs on, and if there is any deficiency arising from the investment, he will be

(*x*) *Wonham* v. *Machin*, L. R. 10 Eq. 447, notwithstanding *Kenebel* v. *Scrafton*, 13 Ves. 370.

(*y*) *Bingham* v. *King*, 14 W. R. 414.

(*z*) *Jones* v. *Davies*, 8 Ch. D. 205.

(*a*) *Foster* v. *Eddy*, 13 Jur. 761; *Cutfield* v. *Richards*, 26 Beav. 241.

(*b*) *Wilson* v. *Lady Dunsany*, 18 Beav. 293; *Brocklehurst* v. *Jessop*, 7 Sim. 438.

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repaid out of the assets in the administration suit in which he has proved his debt (*c*). Neither is the investment made for his benefit, so that he cannot claim accumulations arising from the purchase-moneys, unless they have been carried to his separate account (*d*). So where the Crown has sold extended lands, the proceeds of which have been paid into Court under an order obtained by the purchaser and invested, the Crown will receive only its principal, interest, and costs, and not a share of the accumulations (*e*).

Investments after payment belong to mortgagor.

Where mortgaged property has been sold by the Court, and the purchase-money has been invested, and the mortgage debt paid out of it, the investment and accumulations belong to the mortgagor; and if the money is blended with other funds, an inquiry will be directed to ascertain what has arisen from the investment of the mortgage fund, and of the dividends of the stock purchased with it (*f*).

Section V.

Foreclosure absolute.

i.—Final Order for Foreclosure.—Formerly, on default in payment of the money at the appointed time, the mortgagor stood absolutely foreclosed without further order; but now a final order for foreclosure absolute is required (*g*).

Final order necessary to complete foreclosure.

The final order to a decree of foreclosure is absolutely necessary to its perfection, so much so, that without its being obtained a decree of foreclosure is not a good defence to an action to redeem (*h*); but a release by the mortgagor, after the first decree, would, apparently, be tantamount for the purpose to a final order (*i*).

Application for final order.

Upon an affidavit of non-payment of the money at the appointed time and place, or subsequently, to the person to

(*c*) *Tompsett* v. *Wickens*, 3 Sm. & G. 171.
(*d*) *Irby* v. *Irby*, 22 Beav. 217.
(*e*) *Rex* v. *De la Motte*, 2 H. & N. 589. And see 25 Geo. III. c. 35.
(*f*) *Taylor* v. *Waters*, 1 My. & Cr. 266.
(*g*) *Sheriff* v. *Spark*, West, 130.
(*h*) *Senhouse* v. *Earl*, 2 Ves. Sen. 450. And see *Ford* v. *Wastell*, 2 Ph. 591.
(*i*) *Reynoldson* v. *Perkins*, Amb. 564.

whom it is directed to be paid or his agent, the order for foreclosure contained in the original judgment will be made absolute by an order which may be obtained as of course on motion (*k*). The application is now generally made *ex parte* by summons in chambers, whether proceedings were originally commenced by writ or by originating summons.

Affidavit of default.

The fact that the mortgagor has made default in payment on the day fixed for redemption must be proved by affidavit; the mere fact that the defendant has made default in appearance will not entitle the mortgagee to a final order for foreclosure (*l*).

By whom the affidavit must be made.

It has been repeatedly held that an affidavit by the mortgagee himself is necessary, though he has not attended personally, as well as by any person attending on his behalf, of attendance to receive the money, and of non-payment by the mortgagor (*m*). And this rule has been carried so far that, where one of several mortgagees, of whom one was out of the jurisdiction, made an affidavit for himself positively, and for his co-mortgagees to the best of his knowledge and belief, that the money had not been paid, an order for foreclosure absolute was refused until production of an affidavit by all the mortgagees who were within the jurisdiction (*n*). But where one of two co-mortgagees was abroad, and had given a power of attorney to an agent in this country, an affidavit by the mortgagee who was in England and by the attorney that neither they nor, to the best of their knowledge and belief, the mortgagee who was abroad had received anything, was held to be sufficient (*o*).

Mortgagor not attending for payment.

On affidavit of attendance of the mortgagee or his agent and of the mortgagor's default, the judgment will generally be made absolute as a matter of course (*p*).

Foreclosure absolute has been decreed where the mortgagor attended at the appointed place, but during part only of the time appointed (*q*).

(*k*) For form of affidavit, see *National Permanent Benefit Building Soc.* v. *Raper*, (1892) 1 Ch. 54.

(*l*) *Patey* v. *Flint*, 48 L. J. Ch. 696.

(*m*) *Moore* v. *Horsfield*, W. N. (1882) 43; *Barrow* v. *Smith*, 33 W. R. 733. See *contra*, *Frith* v. *Cook*, 33 W. R. 688.

(*n*) *Kinnaird* v. *Yorke*, 60 L. T. 380.

(*o*) *Docksey* v. *Else*, 64 L. T. 256.

(*p*) As to attendance to receive the money, see *ante*, p. 1070.

(*q*) *Anon.*, 1 Coll. 273; *Lechmere* v. *Clamp*, 31 Beav. 578; *Bernard* v. *Norton*, 10 L. T. N. S. 183.

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When order should be obtained.

In a foreclosure action against a puisne mortgagee and the mortgagor, the final order for foreclosure must be obtained against the puisne mortgagee before an account is taken of subsequent interest and costs, and a time appointed for the exercise of the mortgagor's right of redemption (*r*); and if great delay take place in obtaining it, the Court will require an explanation.

A second mortgagee who finds himself a party to a foreclosure suit by a first mortgagee does not prejudice his right to sue on the covenant in his mortgage by agreeing to a foreclosure order in favour of the first mortgagee (*s*).

Service.

The owner of the equity of redemption must be served (*t*).

Motion for final order after one year from judgment.

A judgment for foreclosure *nisi* is a "proceeding" within the meaning of Ord. LXIV. r. 13, of the Rules of the Supreme Court: so that if more than a year has expired since the date of the judgment, the plaintiff, before moving for an order for foreclosure absolute, must give to the defendant one month's notice of his intention to proceed (*u*).

Death of mortgagor before final order.

The Court will not make a foreclosure absolute in the absence of a properly-constituted representative of a deceased mortgagor. So, where the defendant to a foreclosure action died insolvent before foreclosure absolute, and there was no legal representative of his estate, and an order had been made appointing one of his next of kin a representative of the deceased for the purposes of the action, the Court refused to make the foreclosure absolute (*x*).

Death of one of joint mortgagees.

Where joint mortgagees commenced a foreclosure action and obtained a decree *nisi* appointing a day for payment, and foreclosure in default, but not expressly declaring that the money was payable to the plaintiffs or the survivor of them, and one of the plaintiffs died before the day appointed, it was held that the survivor could not obtain an order for foreclosure absolute, but that a new day must be given (*y*).

Foreclosure absolute of parts of

Where, pursuant to an order for sale in lieu of foreclosure, the mortgaged property was put up for sale in lots, some only

(*r*) *Whitbread* v. *Lyall*, 8 De G. M. & G. 383; *Webster* v. *Patteson*, 25 Ch. D. 626.

(*s*) *Worthington & Co.* v. *Abbott*, (1910) 1 Ch. 588.

(*t*) *Prees* v. *Coke*, L. R. 6 Ch. 645.

(*u*) *Blake* v. *Summersby*, W. N. (1889) 39.

(*x*) *Aylward* v. *Lewis*, (1891) 2 Ch. 81. See *Re Harrowby and Paine*, W. N. (1902) 137.

(*y*) *Blackburn* v. *Caine*, 22 Beav. 614; *Kingsford* v. *Poile*, 8 W. R. 110. But see *contra*, *Browell* v. *Pledge*, W. N. (1888) 166.

of which were sold, an order absolute for foreclosure of the unsold lots was made on the undertaking of the plaintiffs to carry out the contracts for sale of the sold lots; and, by consent, it was ordered that possession of the unsold lots be given to the plaintiffs (*z*).

Property not sold.

A mortgagee who has obtained a judgment *nisi* for foreclosure fixing a day for redemption, cannot obtain a final order, if he has entered and received the rents and profits before default (*a*).

Receipt of rents by mortgagee.

In such cases, there must be further accounts and a new day for payment (*b*). And the mortgagor will not be required forthwith to pay arrears of interest and costs (*c*), as is the rule where the mortgagor applies for extension of time for payment (*d*).

This rule does not apply where the mortgagee has received rents after default but before the affidavit of such default has been sworn (*e*).

Receipt of rents after default.

An order for foreclosure absolute has been made without a further account at the mortgagee's risk (*f*).

Further account dispensed with.

In the case of an ordinary motion for a foreclosure absolute, it is sufficient for counsel to hand in a brief, duly indorsed, to the registrar of the day, unless there are special circumstances to be mentioned to the judge (*g*).

Delivery of indorsed brief to registrar.

After the final decree is entered up, parties cannot be added (*h*); but they may be added by amendment before the decree is drawn up and entered (*i*).

Joinder of parties after decree.

A creditor who after an order *nisi* has obtained the appointment of a receiver by way of equitable execution of the mortgagor's property may obtain an order adding him as defendant, but he is not entitled to have the time for redemption extended (*k*).

(*z*) *Re Kilham, Kilham* v. *Kilham*, W. N. (1888) 224.

(*a*) *Prees* v. *Coke*, L. R. 6 Ch. 645, 650. See *Garlick* v. *Jackson*, 4 Beav. 154.

(*b*) *Alden* v. *Foster*, 5 Beav. 592; *Ellis* v. *Griffiths*, 7 Beav. 83; *Allen* v. *Edwards*, 42 L. J. Ch. 455.

(*c*) *Buchanan* v. *Greenway*, 12 Beav. 355.

(*d*) *Ante*, p. 1069.

(*e*) *Constable* v. *Howick*, 5 Jur. N. S. 331; and see *National Permanent, &c. Building Soc.* v. *Raper*, (1892) 1 Ch. 54, not following *Ross Improvement Commissioners* v. *Usborne*, W. N. (1890) 92.

(*f*) *Farquhar* v. *Young*, W. N. (1886) 40.

(*g*) W. N. (1883) 40; *King* v. *Hough*, W. N. (1895) 60.

(*h*) *Att.-Gen.* v. *Corp. Birmingham*, 15 Ch. D. 422; but see *Pennington* v. *Cayley*, (1912) W. N. 158.

(*i*) *Keith* v. *Butcher*, 25 Ch. D. 751.

(*k*) *Re Parbola, Ltd.*, (1909) 2 Ch. 437, following *Campbell* v. *Holyland*, 7 Ch. D. 166, 168.

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Final decree puts an end to foreclosure action.

A foreclosure absolute, subject to the right of the defendant to apply that the foreclosure may be opened, puts an end to the action, with the exception of the settlement by the judge of the conveyance, if the parties differ; the Court has no power to add to a final foreclosure order by appointing a receiver or otherwise (*l*).

Foreclosure order does not require registration.

An order for foreclosure absolute for lands in Middlesex, not being either a common law judgment within sect. 18 of the Middlesex Registry Act (*m*), nor a decree or order of a Court in equity within sect. 18 of the stat. 1 & 2 Vict. c. 110, need not be entered at the Middlesex Registry (*n*).

Land Transfer Act.

But under the Land Transfer Act, 1875, the registered proprietor of a registered charge may, on obtaining an order for foreclosure absolute, apply to be registered as proprietor of the land (*o*).

Conditional order for possession.

ii.—Order for Delivery of Possession.—A conditional order for delivery of possession should be applied for at the same time as the order *nisi* for foreclosure. The decree will then direct that on default of redemption within the fixed period, the defendant shall stand foreclosed and deliver up possession to the plaintiff (*p*).

Order for possession made if claimed in pleadings.

An order for foreclosure absolute does not of itself entitle the plaintiff to delivery of possession of the land enforceable by writ of possession under Ord. XLII. r. 5 (*q*); but delivery of possession will be ordered, if asked for in the pleadings (*r*).

When decree *nisi* does not order delivery of possession.

So, where an originating summons for foreclosure asked for delivery of possession in the event of foreclosure, and a decree *nisi* for foreclosure was made in the usual form, not directing delivery of possession; it was held, on motion for foreclosure absolute, that the final order ought to direct the mortgagor to deliver up possession of the property, and that the mortgagee ought not to be put to the delay and expense of bringing a new action for recovery of possession (*s*).

When delivery not claimed in pleadings.

But an order for delivery of possession may be made on the motion to make absolute the order *nisi* for foreclosure, though

(*l*) *Wills* v. *Luff*, 38 Ch. D. 197.
(*m*) 7 Anne, c. 20.
(*n*) *Burrows* v. *Holley*, 35 Ch. D. 123.
(*o*) *Ante*, p. 47.
(*p*) *Williamson* v. *Burrage*, 56 L. T. 702.
(*q*) *Wood* v. *Wheater*, 22 Ch. D. 282.
(*r*) See *ante*, p. 1053.
(*s*) *Keith* v. *Day*, 39 Ch. D. 452.

delivery of possession is not directed therein (*t*), and though the pleadings do not ask for possession (*u*).

On the other hand the Court will not under Ord. LV. r. 5A, make an order for possession where possession alone is asked for by the summons apart from foreclosure or other proceedings (*x*), though this has been done in an Irish case (*y*).

Summons for possession only.

Where an action was commenced by summons claiming foreclosure of a sum of stock charged, but not a transfer of the stock, it was held that the order for foreclosure absolute might include a direction for transfer of the stock to the mortgagee (*z*).

Order to transfer stock.

Where a receiver and manager of a business has been appointed in a foreclosure action, the Court refused to make an order to deliver up possession before trial, though it was shown that the management of the receiver was being interfered with to the injury of the property (*a*).

Order for possession refused before trial.

When the mortgage was of leaseholds by demise, with a declaration of trust of the nominal reversion, the Court made a decree *nisi* for foreclosure of the term and reversion, but refused to make a vesting order till the final order for foreclosure absolute (*b*).

Vesting order refused before foreclosure absolute.

Where an order *nisi* for foreclosure and possession has been made, an order absolute also providing for possession may be made *ex parte* (*c*). Where, however, possession was not asked for in the summons nor provided for in the decree *nisi*, it was held that an order for foreclosure absolute and possession ought not to be made *ex parte* (*d*).

When order for delivery of possession may be made *ex parte*.

An order for delivery of possession has been made even after an order for foreclosure absolute (*e*). But as the plaintiff has made two applications for what might have been done in one, he will be refused his costs (*f*).

Order for delivery made after foreclosure absolute.

(*t*) *Salt* v. *Edgar*, 54 L. T. 374.
(*u*) *Craven Bank* v. *Hartley*, W. N. (1886) 189; *Lacon* v. *Tyrrell*, 56 L. T. 483; *Best* v. *Applegate*, 37 Ch. D. 42; *Manchester Bank* v. *Parkinson*, 60 L. T. 258.
(*x*) *Hill* v. *Stephens*, cited Ann. Prac.
(*y*) *Bank of Ireland* v. *Slattery*, (1911) 1 Ir. R. 33.
(*z*) *Ricketts* v. *Ricketts*, W. N. (1891) 29.
(*a*) *Taylor* v. *Sopers*, W. N. (1890) 121; 62 L. T. 944.
(*b*) *British Empire Assur. Co.* v. *Sugden*, 47 L. J. Ch. 691.
(*c*) *Withall* v. *Nixon*, 28 Ch. D. 413. See *Craven Bank* v. *Hartley*, W. N. (1886) 189.
(*d*) *Le Bas* v. *Grant*, 64 L. J. Ch. 368.
(*e*) *Keith* v. *Day*, 39 Ch. D. 452, C. A.; *Jenkins* v. *Ridgley*, 68 L. T. 671.
(*f*) *Keith* v. *Day*, 39 Ch. D. at p. 454.

Where a mortgage is foreclosed by reason of default to redeem in a redemption action the defendant may, by motion or summons, apply for an order for delivery of possession (*g*).

After dismissal of redemption action.

An order for delivery of possession will entitle the mortgagee to a writ of possession, though the order does not name any time at which possession is to be given, and will be nevertheless enforceable by attachment (*h*).

Writ of possession.

Description of property in order for delivery of possession.

An order for delivery of possession included in a judgment for foreclosure absolute should contain a description of the property as set forth in the mortgage deed, so that the sheriff may identify the property of which he is directed to deliver possession (*i*).

Mortgagee entitled to delivery of deeds.

iii.—Order for Delivery of Title Deeds.—In an ordinary foreclosure suit, it is the practice of the Court to order such deeds as remain in the hands of the mortgagor to be delivered up to the mortgagee (*k*). Of course the mortgagee for a term of years cannot claim the title deeds of the freehold without an express agreement (*l*).

Bonâ fide holder.

A judgment of foreclosure may be made at the suit of a first mortgagee without any order against the holder of the deeds for the delivery of them, as where they are in the hands of a person who has taken them *bonâ fide* and without actual or constructive notice of fraud from a person without title (*m*).

To what deeds mortgagee is entitled.

The plaintiff is not entitled, on foreclosure, to an order for delivery to him of deeds subsequent in date to his own mortgage and relating only to the title to the equity of redemption (*n*).

Purchaser from mortgagor entitled to transfer of securities.

Where in a foreclosure action personal judgment for the mortgage debt is given against the mortgagor, and a foreclosure decree is also obtained against the mortgagor and a purchaser from him, the purchaser paying off the mortgage is entitled to have the personal judgment transferred to him as one of his securities (*o*).

(*g*) Ord. XVIII. r. 2.

(*h*) *Re Higg's Mortgage, Goddard* v. *Higg*, W. N. (1894) 73.

(*i*) *Thynne* v. *Sarl*, (1891) 2 Ch. 79.

(*k*) *Holmes* v. *Turner*, 7 Ha. 370, n.; *Heath* v. *Crealock*, L. R. 18 Eq. 215 (affirmed on other points, L. R. 10 Ch. 22).

(*l*) *Wiseman* v. *Westland*, 1 Y. & J. 117.

(*m*) *Kendall* v. *Hulls*, 11 Jur. 864; *sed qu.* since Jud. Act.

(*n*) *Greene* v. *Foster*, 22 Ch. D. 566.

(*o*) *Greenough* v. *Littler*, 15 Ch. D. 93.

Where in an action by a mortgagee to enforce a mortgage debt, the defendant has paid the amount claimed into Court, he cannot obtain a delivery of the title deeds to him on payment into Court of the amount claimed for costs, there being no counterclaim for that purpose. Ord. L. r. 8, does not apply (*p*).

Payment into Court of costs.

iv.—Opening the Foreclosure.—Even after a decree of foreclosure absolute, and although the mortgagee has been in possession for many years, the Court will, under special circumstances, open the decree (*q*).

In some cases, where there was evidence of fraud or oppression, the foreclosure was opened after many years (*r*); and in other cases the Court has granted the relief on fresh evidence adduced on the mortgagor's behalf (*s*).

Grounds for opening foreclosure.

A foreclosure was opened at the instance of the heir of the mortgagor, though the mortgagor had consented to the order and signed the registrar's book (*t*).

Foreclosure opened in favour of heir.

A judgment for sale in lieu of foreclosure obtained against a person who was alleged to be the heir of the deceased mortgagor, was set aside where it turned out that the heirship had not been proved (*u*); and the same rule would doubtless be applied so as to open a foreclosure absolute.

Where the mortgage was of a policy of life assurance, the value of which had been increased by the death of the assured after the day for payment, but before foreclosure absolute, an order for foreclosure absolute made by the chief clerk with knowledge of the death was re-opened with subsequent accounts, and a further period for redemption (*x*).

Life policy falling in before foreclosure absolute.

If the mortgagee has received rents and profits since the account was taken, but before default has been made in payment on the day fixed for redemption, the foreclosure will be opened (*y*). But if the rents are received after default has

Receipt of rents by mortgagee.

(*p*) *Morgan* v. *Greatrex*, W. N. (1884) 2.

(*q*) See *Ford* v. *Wastell*, 2 Ph. 591, and cases cited *inf.*

(*r*) *Burgh* v. *Langton*, 5 Bro. P. C. 213; *Morley* v. *Elways*, 1 Ch. Ca. 107.

(*s*) *Cocker* v. *Bevis*, 1 Ch. Ca. 61; *Ismoord* v. *Claypool*, 1 Rep. in Ch. 139.

(*t*) *Abney* v. *Wordsworth*, 9 Sim. 317, n.

(*u*) *Lancaster Banking Co.* v. *Cooper*, 9 Ch. D. 594.

(*x*) *Beaton* v. *Boulton*, W. N. (1891) 30.

(*y*) *Prees* v. *Coke*, L. R. 6 Ch. 645. See *Garlick* v. *Jackson*, 4 Beav. 154.

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actually been made in payment on the day fixed, the mortgagee may obtain a final order for foreclosure without a further account (*z*), unless there are special circumstances to account for the default (*a*).

Receipt of rents by receiver after certificate.

So, where in a foreclosure action a receiver has received moneys between the date of the certificate and the day fixed for redemption, the foreclosure will be re-opened (*b*). But where rents are received between the day fixed for redemption and the date of the order absolute, the foreclosure will not be re-opened (*c*); nor on the ground that the receiver appointed by the Court has made a mistake in his accounts (*d*).

The mortgagee will not be allowed the benefit of rents received between the certificate and the day fixed for redemption, except on the terms of bringing them into account, and consenting to a fresh period of redemption (*e*). And if a mortgagee, in order to avoid opening the foreclosure, submits to be charged with the moneys in the hands of the receiver, the judgment should reserve liberty to either party to apply for payment of any money paid into Court, or in the hands of the receiver (*f*).

Where the rents received by a receiver appointed in a foreclosure action were stated to be insufficient to pay his expenses and remuneration, the Court, upon the mortgagee's submission to have the foreclosure opened if it should appear that there were any surplus moneys in the hands of the receiver, allowed the receiver's account to be taken at once, postponing the question of the receiver's discharge until after the account (*g*).

Conduct of mortgagee opening foreclosure.

There are also certain acts of the mortgagee which will of themselves open the decree, as if there has been false evidence, unfair conduct, or collusion on his part in obtaining the decree (*h*); or if, after foreclosure, he proceed against the mort-

(*z*) *Constable* v. *Howick*, 5 Jur. N. S. 331; *National Building Soc.* v. *Raper*, (1892) 1 Ch. 54.

(*a*) *Webster* v. *Patteson*, 25 Ch. D. 626.

(*b*) *Barber* v. *Jeckells*, W. N. (1883) 91.

(*c*) *Prees* v. *Coke*, *sup.*; *Webster* v. *Patteson*, *sup.*; *National Bldg. Soc.* v. *Raper*, *sup.*

(*d*) *Ingham* v. *Sutherland*, 63 L. T. 614; *post*, p. 1089.

(*e*) *Jenner-Fust* v. *Needham*, 32 Ch. D. 582, C. A.

(*f*) *Lusk* v. *Sebright*, W. N. (1884) 134. See also *Holt* v. *Beagle*, 55 L. T. 592; *Smith* v. *Pearman*, W. N. (1888) 131.

(*g*) *Ellenor* v. *Ugle*, W. N. (1895) 161.

(*h*) *Burgh* v. *Langton*, 5 Bro. P. C. 213; *Lloyd* v. *Mansell*, 2 P. Wms. 73; *Gore* v. *Stacpoole*, 1 Dow, 18; *Harvey* v. *Tebbutt*, 1 J. & W. 197.

gagor on his covenant or other collateral security (*i*), which he may lawfully do (*k*). The Court will grant an injunction against such proceedings, if the mortgagee has sold the estate or any part thereof (*l*), and deprived himself of the means of letting the mortgagor redeem (*m*).

Sale to person entitled to redeem.

A sale of the estate after foreclosure absolute to one of the persons entitled to redeem at a price equal to the amount of principal, interest, and costs up to foreclosure, was held not to open the foreclosure (*n*).

The foreclosure will not be opened unless the mortgagor satisfies the Court that he will be able to redeem if further time is given; and he may be required to give security for costs in the event of his default (*o*).

Further account, &c. on opening foreclosure.

If the foreclosure is opened, there must be a further account and a fresh period for redemption (*p*); and in this case, the mortgagor will not be required, as in the case of an application by him for enlargement of time, to pay forthwith the interest and costs reported due (*q*).

Opening foreclosure against purchaser from mortgagee.

A foreclosure may be opened as against a purchaser from the mortgagee after the date of the order for foreclosure absolute; and for the purposes of an application to open the foreclosure, the purchaser may be added as a party to the action (*r*).

Sale under power after foreclosure.

Where a mortgagee with a power of sale obtains a decree for foreclosure and then sells, he will not be compelled to sell under his power, as he might thereby incur the risk of opening the foreclosure (*s*).

Where creditor was attorney of debtor.

In one case, after the inrolment of an order of foreclosure absolute obtained by a judgment creditor, a further time for redemption was directed on the ground that the debt consisted of the costs of the judgment debtor incurred in an administration suit, in which the judgment creditor acted as her attorney,

(*i*) *Dashwood* v. *Blythway*, 1 Eq. Ca. Abr. 317 (D. 3). See *Perry* v. *Barker*, 13 Ves. 198; *Dyson* v. *Morris*, 1 Ha. 413, at p. 427.

(*k*) *Tooke* v. *Hartley*, 2 Bro. C. C. 126.

(*l*) *Palmer* v. *Hendrie*, 27 Beav. 349; *S. C.*, 28 Beav. 341.

(*m*) See *Tooke* v. *Hartley*, *sup.*; *Perry* v. *Barker*, 8 Ves. 527; *Palmer* v. *Hendrie*, *sup.*; *Walker* v. *Jones*, L. R. 1 P. C. 50; *Re Burrell*, L. R. 7 Eq. 399; *ante*, p. 934.

(*n*) *Re Power and Carton's Contract*, 25 L. R. Ir. 459.

(*o*) *Bird* v. *Gandy*, 7 Vin. Abr. tit. "Mortgages," 45, pl. 20. See *Stevens* v. *Williams*, 1 Sim. N. S. 545.

(*p*) *Alden* v. *Foster*, 5 Beav. 592; *Ellis* v. *Griffiths*, 7 Beav. 83.

(*q*) *Buchanan* v. *Greenway*, 12 Beav. 355.

(*r*) *Campbell* v. *Holyland*, 7 Ch. D. 166.

(*s*) *Watson* v. *Marston*, 4 De G. M. & G. 230. See *Stevens* v. *Theatres, Lim.*, (1903) 1 Ch. 857,

that the interest of the debtor in the administration suit was five or six times the amount of the debt, that the debtor had no other means of payment, and that the delay which had taken place in that administration suit had not been caused by any fault on her part, but in some degree by the creditor insisting on being made a party to that suit in respect of his charge under the judgment, which he was attempting to enforce in the foreclosure suit (*t*).

When foreclosure not opened.

A decree of foreclosure, however, will not be opened by reason of the overvalue of the estate, and a parol agreement to permit a redemption (*u*); and after many years' possession, the Court will not set aside the foreclosure for mere form (*x*); nor was an action of revivor and supplement a waiver of the decree (*y*); nor will the mere fact of the mortgagee devising the estate as money (*z*), or noticing it, for a collateral purpose, as a debt, open the foreclosure (*a*); and if there have been considerable alterations made in the estate, accompanied with length of possession, the decree will not be opened (*b*). No general rule can, however, be laid down for opening a foreclosure; each individual case must rest on its own merits (*c*).

No partial opening.

A foreclosure absolute cannot be opened in part (*d*).

Principles on which the Court acts as to opening foreclosure.

For an elaborate and lucid explanation of the principles on which the Court acts in opening foreclosures, reference may be made to the judgment of Jessel, M.R., in *Campbell* v. *Holyland* (*e*). The principles are shortly as follows:—

Application must be within reasonable time.

The mortgagor must make his application to open the foreclosure promptly, that is, within a reasonable time. What is a reasonable time must depend upon the nature of the property. A mortgagor must come in more promptly where a mortgagee can enter into immediate possession of and alter the property, than where the property is reversionary which he can only sell.

Ability of mortgagor to make payment must be shown.

It must be shown that the mortgagor had reasonable expectations of obtaining money for payment on the day appointed, and intended to do so, but was prevented by accident (*f*). The

(*t*) *Ford* v. *Wastell*, 2 Ph. 591.
(*u*) *Wishall* v. *Short*, 3 Bro. P. C. 558.
(*x*) *Jones* v. *Kenrick*, 5 Bro. P. C. 244.
(*y*) *Birch's Case*, Gilb. Eq. Rep. 186. See *Pennington* v. *Cayley*, (1912) W. N. 158.
(*z*) *Silberschildt* v. *Schiott*, 3 V. & B. 45; *Stuckville* v. *Dolben*, Sel. Ca. in Ch. 10.
(*a*) *Tooke* v. *Bishop of Ely*, 5 Bro. P. C. 181.
(*b*) *Lant* v. *Crispe*, 5 Bro. P. C. 200; *Tooke* v. *Bishop of Ely*, *sup.*
(*c*) *Thornhill* v. *Manning*, 1 Sim. N. S. 451, 454.
(*d*) *Patch* v. *Ward*, 4 Giff. 96.
(*e*) 7 Ch. D. 166, 170.
(*f*) *Patch* v. *Ward*, L. R. 3 Ch. 203, 212.

amount of the sum required and the difficulty in raising it must be considered in determining what is a reasonable time, whether the difficulty arises from the largeness of the sum, or from the property mortgaged being of a special value to the mortgagor beyond any actual money value which can be set upon it (*g*).

Purchaser from mortgagee will not be disturbed except on strong grounds.

If the property has been sold after foreclosure absolute, the length of time which has elapsed between the date of the order for foreclosure absolute and that of purchase will be taken into consideration. The Court will be loth to disturb a person who purchases many years after the date of the order with no notice of any circumstances which might lead to opening the foreclosure. But the case is otherwise with a purchaser who buys the estate shortly after the date of the order, especially if he has notice of any such circumstances; in such a case the purchaser must be taken to know that the foreclosure is liable to be opened (*h*).

Court will consider conduct of mortgagee.

Finally, the Court will consider whether the default of the mortgagor in paying the money at the time appointed on which the final order was made, was owing to intermediate negotiations or conduct on the part of the mortgagee which led the mortgagor to think that payment on that day would not be required.

Omission from receiver's accounts.

A foreclosure will not be opened merely on the ground that a receiver appointed by the Court in the action has omitted from his account by mistake rents which he has received (*i*).

Where after a foreclosure order *nisi* a judgment creditor in another action who had obtained the appointment of a receiver applied to be added as a defendant and to have the period for redemption extended, the Court refused to extend the period for redemption (*k*).

(*g*) See *Joachim* v. *M'Donall*, 9 Sim. 314, n.

(*h*) *Campbell* v. *Holyland*, 7 Ch. D. 166.

(*i*) *Ingham* v. *Sutherland*, 63 L. T. 614. For forms of orders for bringing into account in foreclosure actions sums in the hands of receivers, see *Barber* v. *Jeckells*, W. N. (1893) 91; *Lusk* v. *Sebright*, W. N. (1894) 134; *Simmons* v. *Blandy*, (1897) 1 Ch. 19.

(*k*) *Re Parbola, Ltd.*, (1909) 2 Ch. 437.

Section VI.

Foreclosure or Sale in Special Cases.

Foreclosure may be obtained against infant.

i.—**Foreclosure or Sale against Infants.**—If the heir or devisee of the mortgagor is an infant, a foreclosure or sale in the alternative is prayed (*l*); and if a foreclosure alone is prayed, the Court will with the mortgagee's consent, refer it to chambers to inquire whether it will not be for the infant's benefit that a sale should be made (*m*); but the mortgagee may object to such a reference and insist on a foreclosure, and it is clear that he may obtain a decree of foreclosure against an infant (*n*).

Usual order for foreclosure.

The usual order on an action of foreclosure against an infant is for a reference to chambers to take the account in the usual way, and appoint a day for payment, and in default of payment the defendant is to be foreclosed; and the decree is to be binding on the infant, unless, on being served with a subpœna to show cause against the same, he shall, by a day six months after he shall have attained the age of twenty-one years, show to the Court good cause to the contrary (*o*). This does not apply when the infant is a trustee for himself and others (*p*).

Infant not entitled to stay of proceedings.

An infant, being defendant in a foreclosure suit, is not entitled to a decretal order on motion under 7 Geo. II. c. 20, or under the general jurisdiction of the Court, to take an account of what is due, and for a reconveyance on payment of the sum found due, with a stay of proceedings in the meantime (*q*).

Foreclosure absolute.

Where the property was not worth the mortgage money, and the plaintiff offered to pay the infant's costs, an immediate order for foreclosure absolute was made without giving a day to show cause (*r*).

(*l*) *Booth* v. *Rich*, 1 Vern. 295; *Scholefield* v. *Heafield*, 7 Sim. 669; *S. C.*, 8 Sim. 470.

(*m*) *Adkins* v. *Graves*, 3 L. J. Ch. 62; *Mondey* v. *Mondey*, 1 V. & B. 223.

(*n*) *Mallack* v. *Galton*, 3 P. Wms. 352; *Bishop of Winchester* v. *Beavor*, 3 Ves. 317; *Booth* v. *Rich*, *sup.*; *Gundry* v. *Baynard*, 2 Vern. 479; *Taylor* v. *Phillips*, 2 Ves. Sen. 23.

(*o*) *Bennett* v. *Edwards*, 2 Vern. 392; *Newbury* v. *Marten*, 15 Jur. 166; *Bennett* v. *Harfoot*, 19 W. R. 428; *Gray* v. *Bell*, 30 W. R. 606; *Mellor* v. *Porter*, 25 Ch. D. 158; but see *post*, p. 1092.

(*p*) *Foster* v. *Parker*, 8 Ch. D. 147.

(*q*) *Taylor* v. *Coates*, 3 Ha. 263.

(*r*) *Croxon* v. *Lever*, 12 W. R.

Foreclosure was made absolute in an action by a legal mortgagee against an infant whose interest had accrued after the judgment, the infant's guardian consenting, and the mortgagee offering to pay the infant's costs as between solicitor and client (*s*).

If there are several defendants and default is made in payment, the foreclosure will be made absolute on such of the defendants as are adult, but as to the infants, the clause *nisi* may be repeated (*t*).

Infant showing cause.

The infant, however, need not wait until twenty-one to show cause against the decree. He may, by his next friend, show cause at any time (*u*). If he shows cause, he may put in a new defence (*x*). He cannot, however, go into the account or redeem, but must show error in the decree (*y*); and if he does not show cause within the limited time, he will be bound (*z*). The process by subpœna is to be served on the defendant on his coming of age, and is a judicial writ (*a*). And no alteration has been made in this practice since the passing of 1 Will. IV. c. 47, s. 10, which has provided that the parol shall not demur by reason of infancy (*b*), or, in other words, that proceedings shall not be stayed till he attains full age.

Refusal of order for foreclosure.

Under special circumstances, the Court will refuse a decree of foreclosure against an infant, as in a case in which a mortgage was assumed to be made under a power, and it was a question whether the power was well exercised (*c*); and in another case (*d*), in which the security was defective, but the heir was bound to make further assurance by his ancestor's covenant. In the latter case the Court ordered the account to be taken, and a day appointed for payment, and in case of default the mortgagee was to be let into possession, and the infant, on attaining twenty-one, was to convey, unless, within six months, he showed good cause to the contrary.

237; *Bennett* v. *Harfoot*, 19 W. R. 428; *Wolverhampton, &c. Co.* v. *George*, 24 Ch. D. 707.

(*s*) *Younge* v. *Cocker*, 32 W. R. 359.

(*t*) *Williamson* v. *Gordon*, 19 Ves. 114.

(*u*) *Richmond* v. *Tayleur*, 1 P. Wms. 736; *Bennett* v. *Lee*, 2 Atk. 531.

(*x*) *Bennett* v. *Lee*, *sup.*; *Fountaine* v. *Caine*, 1 P. Wms. 504; *Napier* v. *Effingham*, 2 P. Wms. 401.

(*y*) *Mallack* v. *Galton*, 3 P. Wms. 352; *Bishop of Winchester* v. *Beavor*, 3 Ves. 317; *Williamson* v. *Gordon*, *sup.*; *Kelsall* v. *Kelsall*, 2 My. & K. 409, 414.

(*z*) 3 Bac. Abr. 615.

(*a*) 1 Dan. Ch. Pr. (7th ed.) 131.

(*b*) *Price* v. *Carver*, 3 My. & Cr. 157; *Scholefield* v. *Heafield*, 7 Sim. 669; *S. C.*, 8 Sim. 470.

(*c*) *Sayle* v. *Freeland*, 2 Vent. 350.

(*d*) *Spencer* v. *Boyes*, 4 Ves. 370. See *Oldaker* v. *Petford*, 2 L. J. Ch. 47.

Right to show cause not affected by Trustee Acts.

The right of an infant in a foreclosure action to a day to show cause is not affected by sect. 30 of the Trustee Act, 1850 (*e*), repealed but virtually re-enacted by the Trustee Act, 1893 (*f*), whereby a vesting order consequential on a judgment against an infant for the conveyance of land is made binding on the rights, legal or equitable, of an infant, inasmuch as a judgment for foreclosure is not made in the form of a judgment for conveyance (*g*).

Order for sale now usually made.

It is now the usual practice to order a sale where the Court is satisfied, by reference to chambers, that this course will be best in the interests of the infant. And where it appears clear, from the circumstances of the case, that a sale would be for the benefit of the infant, the Court will direct a sale without the usual reference (*h*).

Jurisdiction to order sale in discretion of Court.

As to the mortgagee's consent to a sale in lieu of foreclosure of an infant's lands, which was formerly required (*i*), it must be borne in mind that the Court has now, by statute (*k*), a judicial discretion to order a sale of mortgaged lands on the application of any person interested, without the consent of any other person.

Infant of age before decree.

Where the infant attains his majority previous to the date of the decree directing a reference to chambers, and he makes no application to the Court, the mortgagee may obtain an immediate sale (*l*).

Mortgage for term.

And where the mortgage was for a long term of years, the Court directed a reference to ascertain whether a sale of the whole fee would be beneficial to infants who were interested in the equity of redemption and the reversion, and if so, to sell accordingly (*m*).

Infant bound by sale.

The infant will be bound by the order for sale (*n*); and where a sale is ordered it is no longer the practice to give the infant a day to show cause on coming of age (*o*).

(*e*) 13 & 14 Vict. c. 60.

(*f*) 56 & 57 Vict. c. 53, s. 29.

(*g*) *Newbury* v. *Marten*, 15 Jur. 166; *Gray* v. *Bell*, 30 W. R. 606; *Mellor* v. *Porter*, 25 Ch. D. 158.

(*h*) *Siffkin* v. *Davis*, Kay, App. xxi.; *Mears* v. *Best*, 10 Ha. App. li.; *Scholefield* v. *Heafield*, 7 Sim. 669; *S. C.*, 8 Sim. 470; *Redshaw* v. *Newbold*, 12 Jur. 833; *Cockburn* v. *Ankett*, 3 W. R. 641; *Clinton* v. *Bernard*, Dru. 287.

(*i*) See cases cited *ante*, p. 1090, note (*n*).

(*k*) 44 & 45 Vict. c. 41, s. 25, *ante*, p. 753.

(*l*) *Davis* v. *Dowding*, 2 Keen, 247.

(*m*) *Foster* v. *Eddy*, 13 Jur. 761.

(*n*) *Booth* v. *Rich*, 1 Vern. 295; *Scholefield* v. *Heafield*, 7 Sim. 669; *S. C.*, 8 Sim. 470.

(*o*) See Trustee Act, 1893, s. 30.

ii.—Foreclosure against Married Women.—Even apart from the Married Women's Property Act, 1882 (*p*), the same reasoning did not apply in the case of coverture as of infancy, for the law considered that a woman, on her marriage, reposed in her husband sufficient authority to protect her interests, and therefore a decree of foreclosure against a married woman and her husband, of the right of redemption in the wife, was binding, and she was not allowed a day to show cause after discoverture (*q*).

No day to show cause allowed to married woman.

The usual decree is made in the case of a married woman; an immediate order absolute could not be made against her even by consent (*r*), but there seems to be no reason why this should not be done in cases falling within the Act of 1882.

Usual decree.

In a suit for foreclosure of the wife's leaseholds, where the husband had become insolvent, a right of redemption was given to the wife, as well as to the assignees of the husband; and the same right was given in the case of a mortgage of the wife's real estate (*s*).

Right of redemption where husband insolvent.

The estate of the husband or wife, as the case may be, will be indemnified out of the estate of the other of them for whose benefit the money was raised (*t*).

Indemnity.

iii.—Foreclosure or Sale against the Crown.—Where the equity of redemption becomes forfeited to the Crown, a decree of foreclosure cannot be obtained, and if the legal estate has become forfeited, the Court will not, as a general rule, order a sale, unless in an administration suit (*u*). But the Court will give substantial relief by decreeing that the mortgagee shall hold until the security is satisfied or redeemed by the Crown (*x*), or the mortgagee may memorialise the Treasury. And orders for sale have been made, it being understood that the Crown was not pledged to make any grant to a purchaser (*y*). If

No foreclosure where escheat or forfeiture of equity of redemption.

(*p*) 45 & 46 Vict. c. 75.

(*q*) *Mallack* v. *Galton*, 3 P. Wms. 352.

(*r*) *Harrison* v. *Kennedy*, 10 Ha. App. li.

(*s*) *Gleaves* v. *Paine*, 1 De G. J. & S. 87. And see *Exp. Paine*, 3 De G. J. & S. 458; *Lewis* v. *Poole*, 3 Giff. 636.

(*t*) *Wilkinson* v. *Beale*, 1 L. J. Ch. 89; *Gray* v. *Dowman*, 27 L. J. Ch. 702.

(*u*) *Hodge* v. *Att.-Gen.*, 3 Y. & C. Ex. 342; *Rogers* v. *Maule*, 1 Y. & C. C. C. 4. But see *Prescott* v. *Tyler*, 1 Jur. 470; *S. C.*, 2 Jur. 870.

(*x*) *Hodge* v. *Att.-Gen.*, *sup.* See *Hancock* v. *Att.-Gen.*, 12 W. R. 569; *Sutton* v. *Smith*, cited 10 Jur. N. S. 557, n.; *Reeve* v. *Att.-Gen.*, 2 Atk. 223.

(*y*) *Bartlett* v. *Rees*, *inf.*; *Tufnell* v. *Nicholls*, 56 L. T. 152.

the estate has been sold under an extent of the Crown, the Court will order the equitable incumbrances to be paid out of the proceeds (*z*). If the estate is decreed to be sold in an administration suit, as against the Crown having the legal estate, liberty will be given to the purchaser to apply to the Crown for a grant, and he will be decreed to hold the property in the meantime as his own (*a*).

Legal estate in trustee.

If the mortgagor died without heir, and the legal estate was in a trustee, then there was no foundation for any claim of the Crown by escheat, and the Court would decree a sale in favour of an equitable mortgagee (*b*).

Leaseholds.

Where the mortgagor's interest in leaseholds was forfeited to the Crown for felony, the decree against the Crown was sale, not foreclosure (*c*).

Forfeiture for treason, &c. abolished.

33 & 34 Vict. c. 23 (*d*), abolishes forfeiture for treason or felony, and vests the real and personal property in administrators appointed by the Crown (*e*); and, until an administrator is appointed, it enables an interim curator appointed by justices (*f*) to sue and defend actions (*g*). It has not yet been decided whether a decree for foreclosure can now be made against the administrators or interim curator in the usual form, but it would seem that they cannot be foreclosed (*h*).

(*z*) *Casberd* v. *Ward*, 6 Pri. 411, 478.
(*a*) *Rogers* v. *Maule*, 1 Y. & C. C. C. 4.
(*b*) *Prescott* v. *Tyler*, 1 Jur. 470; *S. C.*, 2 Jur. 870; *Scott* v. *Robarts*, 4 W. R. 499. See now 47 & 48 Vict. c. 71.
(*c*) *Bartlett* v. *Rees*, L. R. 12 Eq. 395. See also *Hancock* v. *Att.-Gen.*, 12 W. R. 569.
(*d*) *Ante*, p. 665.
(*e*) Sects. 9, 10.
(*f*) Sect. 21.
(*g*) Sect. 24.
(*h*) See Seton (7th ed.), p. 1840.

CHAPTER L.

THE STATUTES OF LIMITATION IN BAR OF FORECLOSURE.

i.—Application of the Statutes to Actions for Foreclosure.— Formerly, before the passing of the Statute for the Limitation of Actions relating to Real Property (*a*), there was no statutory limitation of time within which a suit in equity might have been brought for foreclosure of the equity of redemption in mortgaged land. But the stat. 21 Jac. I. c. 16, s. 1 (*b*), enacted that no entry into any lands, tenements, or hereditaments should be made but within *twenty* years after the right or title to the same should have accrued or descended.

Statutory limit to entry on lands under stat. 21 Jac. I. c. 16.

The Courts of equity, following the maxim "*expedit reipublicæ ut sit finis litium*," adopted the statutory rule by way of analogy, and applied it to similar cases in equity; and accordingly precluded a mortgagee of land from bringing a suit in equity for foreclosure more than twenty years after his cause of action at law for ejectment had arisen (*c*).

Analogous principle adopted in equity to bar actions for foreclosure.

Independently of statute, in case twenty years had elapsed without payment or demand of interest, a Court would in general have presumed the mortgage was satisfied (*d*).

Laches and stale demand.

So on a summons for foreclosure of a mortgage of an advowson made in 1860 upon which nothing had been paid and no acknowledgment given for forty-eight years, it was held that, though an advowson is not within the Limitation Act, 1833, the summons must be dismissed on the ground of laches and stale demand (*e*).

(*a*) 3 & 4 Will. IV. c. 27.

(*b*) This section is repealed by the Stat. Law Rev. Act, 1863.

(*c*) *Aggas* v. *Pickerell*, 3 Atk. 224; *Hovenden* v. *Lord Annesley*, 2 Sch. & L. 607. See per Sugden, C., 1 Dr. & War. 258 at p. 287.

(*d*) *Trash* v. *White*, 3 Bro. C. C. 289; *Christophers* v. *Sparke*, 2 J. & W. 228. But see *Toplis* v. *Bate*, 2 Cox, 118; *Leman* v. *Newnham*, 1 Ves. Sen. 51. See per Jessel, M.R., in *Sutton* v. *Sutton*, 22 Ch. D. at p. 515, C. A.; and *ante*, p. 1003.

(*e*) *Brooks* v. *Muckleston*, (1909) 2 Ch. 519.

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Stat. 3 & 4 Will. IV. c. 27, s. 2.

By the stat. 3 & 4 Will. IV. c. 27, s. 2, the period within which actions for the recovery of any land or rent must be brought was fixed at twenty years next after the time at which the right to bring such action should have first accrued; and by sect. 24 of the same Act it was provided that no suit in equity should be brought after the time when the plaintiff, if entitled at law, might have brought an action.

Repeal.

Sect. 2 of the above statute has been repealed, and sect. 24 has been virtually superseded by the Real Property Limitation Act, 1874; but the provisions of the earlier Act have been substantially re-enacted, except that the general period for foreclosure has been fixed at twelve years.

No statutory limit to actions for foreclosure of mortgaged personalty.

There is no statutory limitation of time as regards suits (which must, under the former practice, have been brought in a Court of Equity) for foreclosure or recovery by a mortgagee of personal estate included in his mortgage. The analogy of the statutes relating to real estate does not apply. Though the debt is barred in the sense that a personal action on the covenant cannot be brought to recover it, the debt is not gone nor is the right of property destroyed, for there is no provision in any Statute of Limitations whereby the title to mortgaged personalty is extinguished after the lapse of a certain period. And this is so whether the interest is reversionary or in possession (*f*). If the fund were in the hands of a person who could successfully plead the statute against both mortgagor and mortgagee, no doubt the result would be different; but if the holder of the fund either could not or did not plead the statute, the mortgagor could not prevent the holder from handing over the property to the mortgagee (*g*).

ii.—Bar of Action for Foreclosure Twelve Years after Right of Action accrued.—By the Real Property Limitation Act, 1874 (*h*), it is enacted as follows:—

R. P. L. Act, 1874, s. 1.

No land or rent to be recovered but within twelve years after the right of action accrued.

Sect. 1. "After the commencement of this Act no person shall make an entry or distress, or bring an action or suit, to recover any land or rent, but within twelve years next after the time at which the right to make such entry or distress, or to bring such action or suit, shall have first accrued to some person through whom he claims; or if such right shall not have accrued to any

(*f*) *London and Midland Bank* v. *Mitchell*, (1899) 2 Ch. 161.

(*g*) *Ibid.* p. 168, per Stirling, J.

(*h*) 37 & 38 Vict. c. 57.

person through whom he claims, then within twelve years next after the time at which the right to make such entry or distress, or to bring such action or suit, shall have first accrued to the person making or bringing the same."

Action for foreclosure is an action for recovery of land.

After some difference of judicial opinion, it has been determined that a suit for foreclosure is a suit for the recovery of land within the meaning of sect. 24 of the stat. 3 & 4 Will. IV. c. 27 (*i*), and not an action for the recovery of money charged on land within sect. 40 of the same Act. As the period within which actions and suits for the recovery of land must be brought has now been reduced to twelve years, an action for foreclosure of land must now be brought within twelve years after the right to bring such action first accrued, unless there are special circumstances bringing the case within the saving clauses of the Act of Will. IV.

Saving provisions.

The stat. 3 & 4 Will. IV. c. 27, contains saving provisions whereby the period within which actions may be brought to recover lands or rents is kept alive or extended in cases of acknowledgment of the debt, disability, concealed fraud, and express trust. And by sect. 9 of the stat. 37 & 38 Vict. c. 57, whereby certain parts of the stat. of Will. IV. are repealed, it is provided that the remainder of that statute (including the saving clauses here referred to) shall remain in full force and be construed and take effect with reference to the alterations as to limits of time introduced by the later Act.

Doubts having arisen as to whether, under the Act of Will. IV., a mortgagee was not barred of his right to bring a suit for foreclosure in every case, after the lapse of twenty years from the date of the mortgage deed, the stat. 7 Will. IV. & 1 Vict. c. 28, was passed, which enacted that:—

Mortgagees may bring actions to recover land within twenty years after last payment of principal or interest.

"It shall and may be lawful for any person entitled to or claiming under any mortgage of land, being land within the definition contained in the first section of the said Act (*k*), to make an entry or bring an action at law, or suit in equity, to recover such land at any time within twenty years next after the last payment of any part of the principal money or interest secured by such mortgage, although more than twenty years may have elapsed since the time at which the right to make such entry,

(*i*) *Wrixon* v. *Vize*, 3 Dr. & War. 104; *Heath* v. *Pugh*, 6 Q. B. D. 340, C. A.; *S. C.*, *sub nom. Pugh* v. *Heath*, 7 App. Ca. 235; *Harlock* v. *Ashberry*, 19 Ch. D. 539, C. A. But see as to joinder of other claims, *ante*, p. 1053.

(*k*) *I.e.*, 3 & 4 Will. IV. c. 27.

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or to bring such action or suit in equity, shall have first accrued, anything in the said Act to the contrary notwithstanding."

Reduction of this period to twelve years.

By sect. 9 of the stat. 37 & 38 Vict. c. 57, it is provided that the above enactment shall remain in full force and be construed, together with the last mentioned Act, as if the period of *twelve* years had been therein mentioned instead of the period of twenty years.

Result of these enactments.

The general effect of the enactments above referred to in barring the rights and remedies of a mortgagee as against the land charged, may be thus briefly stated.

Extension of statutory limit to all actions or suits at law or in equity for enforcing securities against land.

Sects. 2 to 23 inclusive of the stat. 3 & 4 Will. IV. c. 27, apply to remedies which a mortgagee could have only enforced in a court of law. Sect. 2 of that Act has been repealed by sect. 9 of the stat. 37 & 38 Vict. c. 57, but has been re-enacted in almost identical terms by sect. 1 of the Act, except that the statutory limitation is thereby extended to suits in equity as well as to actions at law, and that the limit of time within which an action or suit must be brought is reduced to twelve years. The effect of sect. 1 of the later Act is, therefore (subject to the provisions contained in sects. 3 to 23 inclusive of the Act of Will. IV., which have been in part perpetuated and in part repealed, but substantially re-enacted by the Act of 1874), to bar the mortgagee's right to enter on the mortgaged lands or to bring an action of ejectment (*l*) or of foreclosure, or to enforce any other legal or equitable remedy against the land after the expiration of twelve years from the time when the right to make the entry or to bring the action or suit first accrued.

Possession adverse to mortgagor.

The Act applies not only as against the mortgagor and persons claiming under him, but also in favour of the mortgagee as against a person who has acquired a title by possession under the statute as against the mortgagor and those claiming under him, provided the mortgage was created before the commencement of the possession on which the person claiming to have acquired a title as against the mortgagor relies (*m*). But it is otherwise where the mortgage is created after the

(*l*) Under the present practice, an action for the recovery of land is substituted for the old common law action of ejectment. See the remarks of Jessel, M.R., in *Gledhill* v. *Hunter*, 14 Ch. D. 492.

(*m*) *Ludbrook* v. *Ludbrook*, (1901) 2 K. B. 96, C. A.

commencement of such adverse possession. The Act does not confer a new right of entry on the mortgagee where at the date of the mortgage a person is in possession adversely to the mortgagor, and the statute has begun to run in his favour against the mortgagor (*n*).

Mortgages of reversionary interests.

The limitation created by the statute applies equally whether the interest mortgaged be reversionary or in possession, a mortgage of a reversionary interest being subject, so far as its nature admits, to the same rules as any other security (*o*).

But by sect. 2 of the Act of 1874 (*p*) the right of action shall be deemed to have first accrued when the future estate or interest falls into possession.

The existence of a prior mortgage at the date of creation of a second mortgage does not make the mortgagor's interest a future interest within the section (*q*).

Statute must be pleaded.

The defence of the statute must be specially pleaded (*r*), except where the defendant is in possession (*s*); and care should be taken to set up the particular statute.

Contribution.

Persons who have neglected to avail themselves of the Statute of Limitations, and who have been held liable to debts which the statute, if it had been set up, would have barred, cannot insist on any right of contribution as against other parties, who, by means of the statute, have repelled the demand against them (*t*).

Marshalling assets.

Nor will the right to marshal assets be in general kept on foot for the purpose of indirectly giving a creditor a right to come upon real estate after his remedy against it has been otherwise barred by the statute (*t*); though under special circumstances, as where a suit had miscarried by no fault of the plaintiff, but by a general misapprehension of the rights of the parties, and the bill had been properly framed for marshalling, a simple contract creditor was, by virtue of the equity of marshalling, held not to be barred by the statute (*u*).

(*n*) *Thornton* v. *France,* (1897) 2 Q. B. 143, C. A.

(*o*) *Sinclair* v. *Jackson,* 17 Beav. 405; *Humble* v. *Humble,* 24 Beav. 535. But see *inf.* as to when the right of action first accrues.

(*p*) 37 & 38 Vict. c. 57, s. 2.

(*q*) *Samuel Johnson and Sons* v. *Brock,* (1907) 2 Ch. 533, *inf.*

(*r*) R. S. C., Ord. XIX. r. 15; but see 4 App. Ca. 51.

(*s*) Ord. XXI. r. 21.

(*t*) *Fordham* v. *Wallis,* 10 Ha. 217.

(*u*) *Vickers* v. *Oliver,* 1 Y. & C. C. C. 211. See *Busby* v. *Seymour,* 1 J. & L. 527, 534.

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When the right shall be deemed to have accrued in case of alienation *inter vivos*, and when the claim is on forfeiture or breach of condition.

iii.—When the Right of Action first accrues.—Sect. 3 of the stat. 3 & 4 Will. IV. provides that the right of entry or distress, or to bring an action to recover any land or rent, shall be deemed to have first accrued so as to cause the statute to begin to run in the case of an estate claimed under an assurance (other than a will) at the time when the person who claims the land or rent, but who has never been in possession or receipt of the rents, first became entitled to such possession or receipt under the assurance; and further, that "when the person claiming, or the person through whom he claims, shall have become entitled by reason of any forfeiture or breach of condition, then such rights shall be deemed to have first accrued when such forfeiture was incurred or such condition broken."

No adverse possession by mortgagor.

The possession of a mortgagor is consistent with, and not adverse to, the rights of the mortgagee, unless it is found as a fact that, by reason of the renunciation by the mortgagee of his rights, or other circumstances, the possession has become adverse (*x*).

Statute runs from the time when, by the terms of the deed, the right to bring action arises.

The statute does not, therefore, run so as to bar the mortgagee's remedy against the land until his legal right to bring an action arises, or, if he have not the legal estate, until he would have had that right if his estate had been a legal instead of an equitable one (*y*). The right, therefore, only arises on some breach by the mortgagor of the mortgage contract; and accordingly cannot arise in the case of a mortgage in the ordinary form before the day appointed for payment, and default then made in payment of principal and interest.

Effect of mortgage giving immediate right of action.

Where the terms of the mortgage deed are such as to give to the mortgagee an immediate right of entry on the execution of the deed, the statute will begin to run against the mortgagee as from that time if there be no subsequent payment of principal or interest, or acknowledgment in writing (*z*). So, if a mortgage debt be made payable on demand, the right of action accrues immediately on the execution of the deed, the demand on the mortgagor not being considered to be a condition precedent to the bringing of the action, as it would be in the case of a promise by a surety to pay a collateral sum on demand (*a*).

(*x*) *Doe* v. *Williams*, 5 A. & E. 254.

(*y*) *Wrixon* v. *Vize*, 3 Dr. & War. 105. See Sug. R. P. St. 32.

(*z*) *Doe* v. *Lightfoot*, 8 M. & W. 553.

(*a*) *Re Brown's Estate, Brown* v. *Brown*, (1893) 2 Ch. D. 300, at p. 305.

The possession of a prior mortgagee during the period does not render the mortgagor's interest a future interest within the section, nor does it suspend the running of the period against the subsequent mortgagee (*b*).

Prior mortgagee in possession.

The right to bring a foreclosure action on an equitable charge on a reversionary interest in land continues until the expiration of twelve years from the time at which the interest has fallen into possession, though the personal remedy for enforcing payment of the debt may have been previously statute-barred (*c*).

When the right arises in case of a mortgage of a reversion.

iv. — Payment of Principal or Interest. — The stat. 7 Will. IV. & 1 Vict. c. 28 provides that a mortgagee must bring his remedy against the mortgaged land within twenty (now twelve (*d*)) years next after the last payment of any part of the principal money or interest secured by the mortgage.

Payment of part of principal or of interest keeps alive remedy against the land.

This enactment does not state by whom the payment is to be made; but it has been laid down that the payment, in order to keep alive the remedy against the land, must be by the mortgagor or some person bound to pay principal or interest on his behalf (*e*).

By whom payment must be made.

The receipt of rents and profits by the mortgagee is not a payment by the mortgagor or by any one on his behalf (*f*).

Mortgagee in possession.

A payment of rent made by a tenant of the mortgaged property to the mortgagee, in consequence of a notice by the mortgagee requiring the rent to be paid by him, is not such a payment, so as to extend the period within which an action for foreclosure may be brought (*g*). The payment in such a case is made by the tenant as rent, and not by an agent of the mortgagor as interest.

Payment of rent to mortgagee by tenant not sufficient.

In a case under the corresponding statute of New Brunswick (*h*), where two persons had each mortgaged property to secure the debt of one of them, who, as between the debtors,

Payment by principal mortgagee keeps alive remedy against surety.

(*b*) *Samuel Johnson and Sons* v. *Brock*, (1907) 2 Ch. 533.

(*c*) *Hugill* v. *Wilkinson*, 38 Ch. D. 480; *Re Lake's Trusts*, 63 L. T. 416; *Re Owen*, (1894) 3 Ch. 220.

(*d*) 37 & 38 Vict. c. 57, s. 8.

(*e*) *Harlock* v. *Ashberry*, 19 Ch. D. 539, C. A. See also the decisions, cited *ante*, pp. 1007 *et seq.*, as to what is sufficient "payment" under 3 & 4 Will. IV. c. 42, s. 5.

(*f*) Per Jessel, M.R., in *Cockburn* v. *Edwards*, 18 Ch. D. 449, at p. 457, C. A.

(*g*) *Harlock* v. *Ashberry*, *sup.*

(*h*) Cons. Stat. c. 84, s. 30.

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was to be deemed to be the principal, the other being merely surety, and the surety's mortgage deed expressly provided that the principal should be entitled to pay the interest and to redeem the mortgage, it was held, in an action for foreclosure, that the statute began to run as from the date of the last payment by the principal debtor (*i*).

Payment by tenant for life.

If the same person is both mortgagor and mortgagee he will be presumed to keep down the interest out of the rents. So where a mortgagee tenant for life of the mortgaged estate is alone in possession of the rents, the statute does not run against the mortgaged title; the interest is deemed to be paid out of the rents (*k*). So, where a tenant for life pays off a charge on the settled estates, and receives the rents for more than the statutory period, the charge on the estates will not be barred in favour of the remainderman, though there has been no part payment or acknowledgment (*l*).

Tenant in common.

The same principle applies where the mortgagee is a tenant in common of the mortgaged premises (*m*).

Payment of interest by mortgagor binds purchaser.

Where a mortgagor sells part of the mortgaged premises, and the purchaser remains in possession for twelve years, the property in his hands is still liable to the mortgagee if interest has been paid out of the part not sold (*n*).

Payment by adult party to suit held not to affect infant parties.

Where by a consent order in a foreclosure suit in which the Statute of Limitations had been set up, a payment was made to the plaintiff in part discharge of his claim, it was held that though the payment would have defeated the bar created by the statute as between adults, the rights of infants who were parties to the suit were not affected (*o*).

How far actions prevent the statute from running.

v.—Institution of Action by Mortgagee.—An action properly instituted bars the statute, and, during its pendency, time does not run (*p*); so that where a decree for foreclosure was made before the Judicature Act, against a purchaser for value from the mortgagor without notice, but the mortgagee

(*i*) *Lewin* v. *Wilson*, 11 App. Ca. 639, P. C.

(*k*) *Wynne* v. *Styan*, 2 Ph. 303; *Lord Carbery* v. *Preston*, 13 Ir. Eq. R. 455.

(*l*) *Burrell* v. *Earl of Egremont*, 7 Beav. 205. See *ante*, p. 1012.

(*m*) *Wynne* v. *Styan*, *sup.*

(*n*) *Re Lord Muskerry*, 9 Ir. Ch. R. 94.

(*o*) *Thwaites* v. *McDonough*, 2 Ir. Eq. R. 97.

(*p*) *Wrixon* v. *Vize*, 3 Dr. & War. 104, 123; *Re Ebb's Estate*, 31 L. R. Ir. 95.

was left to his remedy at law for recovery of possession, time began to run only from the date of the decree (*q*).

Issue of fresh writ after discontinuance.

But if a writ, issued within the statutory period, is not continued and a fresh writ is issued, the last writ issued is the commencement of the suit, and if this is after the expiration of the statutory limit, the plaintiff is barred (*r*).

Renewal of writ.

If a writ which has not been served on a defendant within twelve months from the date thereof is not renewed within that period (*s*), the Court will not allow the writ to be afterwards renewed so as to prevent the plaintiff's claim from being barred by the statute (*t*), unless under exceptional circumstances (*u*).

Revivor of action.

After long lapse of time, revivor of an action which has become defective by the death of a party or otherwise, is subject to the discretion of the Court, and will be refused in cases of great delay, gross negligence, laches, or change in the situation of the parties (*x*).

Whether rights of mortgagee defendant are kept alive by suit.

The question as to whether an incumbrancer, who is made a defendant to a suit, in which he could claim payment of his charge, is exonerated from taking proceedings so as to prevent the statute from running against him, is not free from doubt (*y*). In such a case the safest course appears to be for the defendant to counterclaim (*z*).

Creditors' suits.

It is a question how far a suit by one creditor prevents the statute from running against other creditors. It was held that a judgment debt is barred by the lapse of twenty years, notwithstanding a creditor's suit was in the meantime instituted, and a decree made, and though a sufficient sum remained in Court for payment of the debt (*a*); and the existence of a creditor's administration suit was held not to prevent the

(*q*) *Heath* v. *Pugh*, 7 App. Ca. 235; affirming 6 Q. B. D. 345.

(*r*) *Pratt* v. *Hawkins*, 15 M. & W. 399. See also *Manby* v. *Manby*, 3 Ch. D. 101.

(*s*) See R. S. C., Ord. VIII. r. 1.

(*t*) *Bailey* v. *Owen*, 9 W. R. 128; *Doyle* v. *Kaufman*, 3 Q. B. D. 340; *Magee* v. *Hastings*, 28 L. R. Ir. 288.

(*u*) *Hewett* v. *Barr*, (1891) 1 Q. B. 98.

(*x*) *Curtis* v. *Sheffield*, 20 Ch. D. 398; *Fussell* v. *Dowding*, 27 Ch. D. 237. See *Pennington* v. *Cayley*, (1912) W. N. 158.

(*y*) Compare *Humble* v. *Humble*, 24 Beav. 535, with *Watson* v. *Birch*, 15 Sim. 523. See also *Murphy* v. *Sterne*, 1 Dr. & War. 236; *Re Owen Lewis*, (1903) 1 Ir. R. 348.

(*z*) See Darby & Bosanquet, St. Lim. (2nd ed.) p. 569.

(*a*) *Berrington* v. *Evans*, 1 Y. & C. Ex. 434; see *Re Owen Lewis*, *sup.* A different rule was laid down in *Sterndale* v. *Hankinson*, 1 Sim. 393, where a creditor instituted an administration suit on behalf of himself and all other creditors; but this decision is quite inapplicable under the present practice. See *Re Greaves, Bray* v. *Tofield*, 18 Ch. D. 551, 554; *Thompson* v. *Hurley*, (1905) 1 Ir. R. 588.

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statute from running in respect of a debt not claimed under the decree (*b*).

Judgments.

A revival by motion since the Judicature Act is sufficient to take a judgment out of the statute, and the period of limitation begins to run only from the date of the last revival (*c*).

The statute applies to a case in which a judgment is sought to be enforced against the personal estate, as well as to a case in which it is sought to be enforced against the land of the debtor (*d*).

vi.—What Acknowledgment is sufficient to keep alive the Right of Foreclosure.—By the stat. 3 & 4 Will. IV. c. 27, it is enacted as follows:—

Acknowledgment in writing given to the person entitled, or his agent, to be equivalent to possession or receipt of rent, and time to run from date thereof.

Sect. 14. "Provided always, and be it further enacted, that when any acknowledgment of the title of the person entitled to any land or rent shall have been given to him or his agent in writing signed by the person in possession or in receipt of the profits of such land, or in receipt of such rent, then such possession or receipt of or by the person by whom such acknowledgment shall have been given, shall be deemed, according to the meaning of this Act, to have been the possession or receipt of or by the person to whom or to whose agent such acknowledgment shall have been given at the time of giving the same, and the right of such last-mentioned person, or any person claiming through him, to make an entry or distress, or bring an action to recover such land or rent, shall be deemed to have first accrued at and not before the time at which such acknowledgment, or the last of such acknowledgments, if more than one, was given."

R. P. L. Act, 1874.

This enactment is revived and continued in full force by sect. 9 of the Real Property Limitation Act, 1874 (*e*), and is to be construed together with that Act.

Effect of sect. 14.

The words "provided always, and be it further enacted," seem, notwithstanding a dictum of Lord St. Leonards to the contrary (*f*), to indicate that this section refers to rights of action accruing under other sections of the Act; and accordingly it is conceived that the effect of the section is not to set the time running from the time when an acknowledgment is given, though no cause of action may then have arisen, but to make an acknowledgment within the section, given after a cause of action has arisen, operate so as to cause the time to

(*b*) *Tatam* v. *Williams*, 3 Ha. 347.
(*c*) See *Berrington* v. *Evans*, 1 Y. & C. Ex. 434; *Farran* v. *Beresford*, 10 Cl. & F. 319; *Farrell* v. *Gleeson*, 11 Cl. & F. 702.
(*d*) *Watson* v. *Birch*, 15 Sim. 523.
(*e*) 37 & 38 Vict. c. 57.
(*f*) *Scott* v. *Nixon*, 3 Dr. & War. 388, 404. See also *Burroughs* v. *McCreight*, 1 J. & L. 290, 304.

begin to run afresh as from the time when the acknowledgment is given (*g*).

Acknowledgment after period has expired.

An acknowledgment given after the statutory period has expired is of no avail under this section, for the title is extinguished, and cannot be restored (*h*).

To whom acknowledgment must be given.

An acknowledgment under this section must be given to the person entitled or his agent; and, accordingly, such an acknowledgment given to a third party, unlike an acknowledgment under sect. 5 of the stat. 3 & 4 Will. IV. c. 42 (*i*), will be of no effect to preserve a mortgagee's right of action (*k*).

Admission in answer.

But where a defendant in a Chancery suit by his answer acknowledged the title of the plaintiff, it was held that this was a good acknowledgment within sect. 14 (*l*).

Parol evidence of lost acknowledgment in writing.

An acknowledgment under sect. 14 must be in writing; but when a written acknowledgment has been lost, parol evidence of the contents may be given (*m*).

Signature of acknowledgment.

The acknowledgment, in order to keep alive the mortgagee's remedy against the land, is required, by sect. 14, to be signed by the person in possession or in receipt of the profits or rents, and, accordingly, an acknowledgment signed by an agent of such a person is insufficient (*n*). But where a principal was incapacitated by illness from writing, an acknowledgment written and signed in the name of the principal by an amanuensis was held to be sufficient (*o*).

What is sufficient acknowledgment.

Any expressions which on a fair and reasonable construction amount to an admission of a mortgagee's title will be a sufficient acknowledgment within this section. So a deed bearing date more than twenty years before action brought, but which was, in fact, executed by the defendant within twenty years, and which contained a covenant to pay a mortgage debt secured by a surrender of copyholds, referred to in the deed, was held to be a sufficient acknowledgment of the mortgagee's title (*p*). So, also, a letter written by the person in possession to the solicitor of the person entitled, in answer to a letter of the

(*g*) See Darby & Bosanquet's St. Lim. (2nd ed.) p. 381. As to when a cause of action arises, see *supra*, p. 1100.

(*h*) *Sanders* v. *Sanders*, 19 Ch. D. 373.

(*i*) See *ante*, p. 1007.

(*k*) See *Fursdon* v. *Clegg*, 10 M. & W. 572; *Goode* v. *Job*, 28 L. J. Q. B. 1.

(*l*) *Goode* v. *Job*, *sup.* See *Blair* v. *Nugent*, 3 J. & L. 677.

(*m*) *Haydon* v. *Williams*, 7 Bing. 163; *ante*, p. 1017.

(*n*) *Ley* v. *Peter*, 3 H. & N. 101.

(*o*) *Dublin Corporation* v. *Judge*, 11 L. R. Ir. 9.

(*p*) *Jayne* v. *Hughes*, 10 Exch. 430.

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latter asserting the title and demanding rent, whereby the person in possession did not deny the title, but asked to be allowed time for payment, was held to be a good acknowledgment of title (*q*). So, also, a correspondence from which it appeared that the person in possession, whilst he did not admit the right of the plaintiffs to be free from doubt, stated that he was ready to account, and that he only claimed the estate subject to the amount which might be found due on the footing of the account, was held to be sufficient (*r*). But the document must contain expressions which clearly admit the title, or otherwise there will be no sufficient acknowledgment (*s*).

As to whether an admission by a debtor in bankruptcy proceedings signed by him is a sufficient acknowledgment, see the cases cited falling under sect. 40 of this Act, which would seem equally applicable under sect. 14 (*t*).

Sufficiency is a question of law.

Whether a document is a sufficient acknowledgment of title within this section is a question for the judge, and not for the jury, to decide (*u*).

Time of giving acknowledgment.

The "time of giving the same" means the signing of the writing where it differs from the time at which it is dated (*x*).

Acknowledgment by mortgagor binds occupier.

Where the mortgagor has paid interest or made acknowledgment, the mortgagee can recover against the occupier under the mortgagor, though the occupier has been in adverse possession twelve years (*y*).

Stat. 3 & 4 Will. IV. c. 27, s. 16 (repealed).

vii.—Savings in Case of Disabilities.—By sect. 16 of the stat. 3 & 4 Will. IV. c. 27, it was provided that persons under disability of infancy, coverture, or lunacy, or who were beyond seas, and the representatives of such person, were to be allowed ten years from the determination of their disability or death.

R. P. L. Act, 1874, s. 3.

This enactment is repealed by sect. 9 of the stat. 37 & 38 Vict. c. 57, whereby it is enacted as follows:—

In cases of infancy, coverture, or lunacy at the

Sect. 3. "If at the time at which the right of any person to make an entry or distress, or to bring an action or suit to recover any land or rent shall have first accrued as aforesaid, such person

(*q*) *Fursdon* v. *Clegg*, 10 M. & W. 572.

(*r*) *Incorporated Society* v. *Richards*, 1 Dr. & War. 258.

(*s*) *Doe* v. *Edmunds*, 6 M. & W. 295. See *Morrell* v. *Frith*, 3 M. & W. 402.

(*t*) See *Hanan* v. *Power*, 8 Ir. L. R. 505.

(*u*) *Doe* v. *Edmunds*, *sup.*; *Morrell* v. *Frith*, *sup.* See *Routledge* v. *Ramsay*, 8 A. & E. 221; *Collis* v. *Stack*, 1 H. & N. 605. But see *Incorporated Society* v. *Richards*, 1 Dr. & War. 258.

(*x*) *Jayne* v. *Hughes*, *sup.*

(*y*) *Doe* v. *Eyre*, 17 Q. B. 366; *Forsyth* v. *Bristowe*, 8 Exch. 716, 722; *Eyre* v. *Walsh*, 10 Ir. Com. L. R. 346.

shall have been under any of the disabilities hereinafter mentioned (that is to say), infancy, coverture, idiotcy, lunacy, or unsoundness of mind, then such person, or the person claiming through him, may, notwithstanding the period of twelve years, or six years (as the case may be) hereinbefore limited, shall have expired, make an entry or distress, or bring an action or suit to recover such land or rent, at any time within six years next after the time at which the person to whom such rights shall have first accrued shall have ceased to be under any disability, or shall have died, whichever of those two events shall have first happened."

time when the right of action accrues, then six years to be allowed from the termination of the disability or person's death.

Sect. 4. "The time within which such entry may be made, or any such action or suit may be brought as aforesaid, shall not in any case after the commencement of this Act be extended or enlarged by reason of the absence beyond seas during all or any part of that time of the person having the right to make such entry or to bring such action or suit, or of any person through whom he claims."

No time to be allowed for absence beyond seas.

Effect of these enactments.

The effect of the two sections above set out is to reduce the period of limitation, after termination of the disability, from ten to six years, and to exclude absence beyond seas altogether from the causes of disability.

Successive disabilities.

Sect. 3 applies to cases where there is a continuous succession of disabilities. Where a person is under a disability when his right to bring an action for the recovery of land accrues, and, before the removal of that disability, he falls under another disability, his right of action is preserved until the removal of the latter disability (*z*).

But when once the time begins to run, no subsequent disability on the part of the person to whom the right of action originally accrued, or of anyone claiming under him, will stop the time from running (*a*).

Extent of saving of disability of infancy.

Inasmuch as mortgage estates in freehold or leasehold lands of a mortgagee dying on or after the 1st January, 1882, devolve on his personal representatives, the disability of infancy can now keep alive the right of action only where the mortgagee died before that date, except in the case of copyholds to which the mortgagee had been admitted (*b*).

Mortgagor's disability does not prevent statute from running.

In order to keep alive the right of the mortgagee and those claiming under him, the disability must be that of the mortgagee himself, otherwise the general limitation of twelve

(*z*) *Borrows* v. *Ellison*, L. R. 6 Ex. 128.

(*a*) *Murray* v. *Watkin*, 62 L. T. 796; *Garner* v. *Wingrove*, (1905) 2 Ch. 233.

(*b*) 44 & 45 Vict. c. 41, s. 30; 57 & 58 Vict. c. 46, s. 88; see *ante*, p. 867.

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(formerly twenty) years is an absolute bar, and cannot be extended by reason of the mortgagor being under disability (*a*).

Possession of infant.

The possession of an infant's estate by his father (*d*), or other near relative (*e*), will generally be regarded as the possession of the infant by his bailiff so as to prevent the statute from running.

Possession of married woman.

Complete and unfettered rights of action being given by the Married Women's Property Act, 1882 (*f*), coverture is no longer a disability within the meaning of the Statutes of Limitation, at all events so far as regards cases falling within the former Act, that is to say, where the woman was married on or after the 1st January, 1883, or where she was married before, but her title accrued after that date. As regards cases where the woman was married and her title accrued before the 1st January, 1883, the question whether coverture is a disability so as to keep alive her right to bring an action for foreclosure is perhaps not free from doubt (*g*). But it is conceived that the effect of sect. 1 (ii) of the Act enabling married women to sue alone is to put an end to the disability of coverture as from the date of the commencement of that Act, so as to cause the Statutes of Limitation to run as against a *coverte* mortgagee in like manner as if she had become *discoverte* on that date (*h*).

Absence beyond seas, whether still a disability in the case of a mortgagee of personalty.

As the stats. 3 & 4 Will. IV. c. 27, and 37 & 38 Vict. c. 57, apply only where a mortgage is of land or rent, and as sect. 10 of the Mercantile Law Amendment Act (*i*), whereby absence beyond seas no longer extends rights of action, applies only to personal remedies, and not to remedies *in rem*, it would seem that on the analogy of the provision, saving disabilities in the case of legal remedies contained in sect. 7 of the stat. 21 Jac. I. c. 16, absence beyond seas might still be deemed to be a disability keeping alive the equitable right to bring an action for foreclosure in the case of a mortgagee of personalty (other than leaseholds) who is beyond seas, and to prevent the period of limitation from beginning to run till after his return. It was,

(*c*) *Forster* v. *Patterson*, 17 Ch. D. 132.

(*d*) *Thomas* v. *Thomas*, 2 K. & J. 79; *Re Hobbs*, *Hobbs* v. *Wade*, 36 Ch. D. 553.

(*e*) *Pelly* v. *Bascombe*, 4 Giff. 79.

(*f*) 45 & 46 Vict. c. 75.

(*g*) See Darby & Bosanquet, St. Lim. (2nd ed.) p. 392.

(*h*) See *Weldon* v. *Winslow*, 13 Q. B. D. 784, C. A. (tort); *Re Isaac*, *Jacob* v. *Isaac*, 30 Ch. D. 418, C. A. (breach of trust).

(*i*) 19 & 20 Vict. c. 97, *ante*, p. 1019.

however, held that sect. 16 of the stat. 3 & 4 Will. IV. c. 27, saving rights of persons beyond seas, did not apply as between mortgagor and mortgagee of land (*k*), and possibly the principle of this decision might be extended so as to cover the case of a mortgagee of personalty.

Disability if relied on must be pleaded.

Where disability is relied on as an excuse for not coming to the Court, it must be clearly stated. It is not enough to say generally that there have been infancies, or other disabilities owing to which the plaintiff, during part of the time, has been unable to assert or prosecute his right (*l*).

Utmost allowance for disabilities under 3 & 4 Will. IV. c. 27, s. 17 (repealed).

By sect. 17 of the stat. 3 & 4 Will. IV. c. 27, it was provided that no action should be brought by any person under disability when his right first accrued, but within forty years next after the accruer of the right, though such disability might have lasted during the whole of that period, or though the term of ten years from the cessation of any such disability should not have expired.

This enactment is repealed by the stat. 37 & 38 Vict. c. 57, which enacts as follows:—

Thirty years utmost allowance for disabilities.

Sect. 5. "No entry, distress, action, or suit shall be made or brought by any person who at the time at which his right to make any entry or distress or to bring an action or suit to recover any land or rent shall have first accrued, shall be under any of the disabilities hereinbefore mentioned, or by any person claiming through him, but within *thirty* years next after the time at which such right shall have first accrued, although the person under disability at such time may have remained under one or more of such disabilities during the whole of such thirty years, or although the term of six years from the time at which he shall have ceased to be under such disability or have died, shall not have expired."

No further time to be allowed for successive disabilities.

By sect. 18 of the stat. 3 & 4 Will. IV. c. 27, it is provided that where a person under disability at the accruer of the right shall die during the disability, no time to sue beyond the twenty years next after the accruer of the right, or the ten years next after the death of the person under disability, shall be allowed by reason of the disability of any other person. This enactment is preserved in full force by sect. 9 of the stat. 37 & 38 Vict. c. 57, except that the periods are reduced

(*k*) *Kinsman* v. *Rouse*, 17 Ch. D. 104.

(*l*) *Blewitt* v. *Thomas*, 2 Ves. jun. 669, a decision under the old law in a case of redemption.

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to twelve and six years respectively on and after the 1st January, 1879.

viii.—**Fraud.**—There may be circumstances, besides the legal disabilities before noticed, which would take the case out of the statute; as if there was fraud in the transaction (*m*); or if the mortgagor, being the mortgagee's executor, concealed the mortgage, or the like (*n*).

By sect. 26 of the stat. 3 & 4 Will. IV. c. 27, it is enacted that—

In cases of fraud, no time shall run while the fraud remains concealed.

"In every case of a concealed fraud, the right of any person to bring a suit in equity for the recovery of any land or rent, of which he, or any person through whom he claims, may have been deprived by such fraud, shall be deemed to have first accrued at, and not before, the time at which such fraud shall or with reasonable diligence might have been first known or discovered: Provided that nothing herein contained shall enable any owner of lands or rents to have a suit in equity for recovery of such lands or rents, or for setting aside any conveyance of such lands or rents on account of fraud, against any *bonâ fide* purchaser for valuable consideration, who has not assisted in the commission of such fraud, and who at the time that he made the purchase did not know, and had no reason to believe, that any such fraud had been committed" (*o*).

Bonâ fide purchaser without notice.

In the exception in the Statute of Limitations in favour of *bonâ fide* purchasers for valuable consideration without notice of any fraud, the purchaser is not protected if he contracts through an agent cognisant of the fraud (*p*).

But fraud, or the non-discovery of fraud, cannot be relied on to take the case out of the Statutes of Limitation, unless committed either personally by the person who relies on the statute, or by his agent while acting within the scope of his authority (*q*), or by someone through whom he claims (*r*).

Mistake.

In cases of mistake, time did not formerly run until the dis-

(*m*) *Spurgeon* v. *Collier*, 1 Ed. 55, a case of fraud on the part of a mortgagee, but the principle would seem to apply equally to a mortgagor.

(*n*) See *ante*, p. 56, as to forfeiture of the right of redemption as against a *puisne* mortgagor by concealment of prior incumbrances.

(*o*) As to what is "concealed fraud," see *Lawrance* v. *Lord Norreys*, 15 App. Ca. 213; *Willis* v. *Earl Howe*, (1893) 2 Ch. 545, C. A.; *Thorne* v. *Heard*, (1895) A. C. 495; *Re McCallum*, (1901) 1 Ch. 143, C. A.

(*p*) *Smith* v. *Chichester*, 2 Dr. & War. 393; *Vane* v. *Vane*, L. R. 8 Ch. 383.

(*q*) *Thorne* v. *Heard*, (1895) A. C. 495.

(*r*) *Re McCallum*, *sup.*

covery of the mistake (*s*); but in the case of money paid under a mistake of fact the statute now runs from the time of such payment (*t*).

ix.—Express Trusts.—By sect. 25 of the stat. 3 & 4 Will. IV. c. 27, it was provided that, in cases of express trust, that is to say, trusts expressly declared by a deed or other instrument, the right of the *cestui que trust* to bring a suit against the trustee to recover land or rent vested in him should not be deemed to have accrued until the land or rent should have been conveyed to a purchaser for valuable consideration.

Saving in case of express trusts under 3 & 4 Will. IV. c. 27, s. 25.

But now express trusts of money charged on land or rent are brought within the Statute of Limitations by the stat. 37 & 38 Vict. c. 57, which enacts as follows:—

R. P. L. Act, 1874, s. 10.

Sect. 10. "After the commencement of this Act, no action, suit, or other proceeding shall be brought to recover any sum of money or legacy charged upon or payable out of any land or rent at law or in equity, and secured by an express trust, or to recover any arrears of rent or of interest in respect of any sum of money or legacy so charged or payable, and so secured, or any damages in respect to such arrears, except within the time within which the same would be recoverable if there were not any such trust."

Time for recovering charges, &c., not to be enlarged by express trusts for raising same.

The effect of this enactment is to render it immaterial whether a security on land for a loan or debt is by way of mortgage in the ordinary form, or by way of trust for sale.

A conveyance of a term on trust for raising money was held to be an express trust within the section (*u*).

So a trust to pay an annuity out of rents and profits of land will not take the annuity out of the operation of sect. 1 of this Act (*x*), so as to enable any arrears of the annuity to be recovered after twelve years from the time when the present right to receive payment of the annuity first accrued (*y*).

Annuity deed.

x.—Extinguishment of Right of Party out of Possession.—By sect. 34 of the Act it is provided that at the determination of the period for making an entry or distress, or bringing any

(*s*) *Brooksbank* v. *Smith*, 2 Y. & C. Ex. 58.

(*t*) *Baker* v. *Courage*, (1910) 1 K. B. 56.

(*u*) *Williams* v. *Williams*, (1900) 1 Ch. 152.

(*x*) Set out *ante*, p. 1096.

(*y*) *Lyell* v. *Kennedy*, 14 App. Ca. 437. See *Hughes* v. *Coles*, 27 Ch. D. 231.

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action or suit, the right and title to the land or other property claimed is extinguished (*z*).

Effect of extinguishment.

The effect of this extinguishment is to vest the land or other property in the mortgagor, freed from any mortgage rights, as if a release had been executed (*a*); and this as against a person who previously had the legal estate (*b*); and though the mortgagor has after the expiration of the period given an acknowledgment (*c*).

If the mortgagor has been in possession without acknowledgment or payment of interest during the statutory period, the fact that a prior mortgage was in existence during part of that period will not prevent the legal estate from passing to the mortgagor, and, through him, to a subsequent mortgagee or purchaser, on the expiration of the period, even though the mortgagor has, after such expiration, acknowledged the debt (*d*). Nor is the running of the period suspended by the prior mortgagee's entry into possession (*e*). When once the statute has begun to run, it does not cease to run because some person subsequently falls under disability (*f*).

The distinction between the old Statutes of Limitation and the present enactment in this respect is that the former barred the remedy, but did not extinguish the right, but under the latter, when the remedy is barred, the right and title of the real owner are extinguished and transferred to the person whose possession is a bar (*g*).

Consequently a mortgagor is entitled to payment out of Court of a fund representing the mortgaged property without being put on terms of satisfying the debt, inasmuch as the effect of sect. 34 is to extinguish the mortgage (*h*).

Legal estate outstanding in paid off mortgagee.

So, the legal estate outstanding in a mortgagee who had been paid off, but had never executed a reconveyance, was held to be extinguished after thirteen years' possession by the mortgagor from the date of such payment (*i*).

(*z*) 3 & 4 Will. IV. c. 27, s. 34.
(*a*) *Doe* v. *Sumner*, 14 M. & W. 39; *Incorporated Soc.* v. *Richards*, 1 Dr. & War. 289.
(*b*) *Doe* v. *Barnard*, 13 Q. B. 952; and see 11 Jur. N. S. pt. 2, p. 151.
(*c*) *Kibble* v. *Fairthorne*, *inf.*
(*d*) *Kibble* v. *Fairthorne*, (1895) 1 Ch. 219.
(*e*) *Samuel Johnson and Sons* v. *Brock*, (1907) 2 Ch. 533.
(*f*) *Garner* v. *Wingrove*, (1905) 2 Ch. 233.
(*g*) Per Sugden, C., 1 Dr. & War. at p. 289. See *Re Alison, Johnson* v. *Mounsey*, 11 Ch. D. 284, 296, C. A.
(*h*) *Re Hazeldine's Trusts*, (1908) 1 Ch. 34, C. A.
(*i*) *Sands to Thompson*, 22 Ch. D.

A title once extinguished by the statute cannot be revived or revested by acknowledgment (*k*), or by re-entry (*l*).

No revivor of extinguished right.

The extinguishment of a plaintiff's right by virtue of sect. 34 may be raised by the defendant, though he has not expressly pleaded it (*m*).

Extinguishment need not be pleaded.

614. See *Bolling* v. *Hobday*, 31 W. R. 9.

(*k*) *Sup.* n. (*d*). As to keeping alive a mortgagor's right of redemption by the mortgagee's acknowledgment, see *ante*, pp. 776 *et seq.*

(*l*) *Bryan* v. *Cowdal*, 21 W. R. 693; *Brassington* v. *Llewellyn*, 27 L. J. Ex. 297.

(*m*) *Dawkins* v. *Lord Penrhyn*, 4 App. Ca. 59.

CHAPTER LI.

THE REMEDIES OF A MORTGAGEE ON THE BANKRUPTCY OF THE MORTGAGOR.

Jurisdiction of High Court and County Courts.

I.—General Jurisdiction of the Courts in Bankruptcy.—By the Bankruptcy Act, 1883, it is provided that the jurisdiction in bankruptcy matters is to be exercised by the High Court and County Courts (*a*). The business in bankruptcy is assigned to the King's Bench Division, and to a special judge (*b*).

It is enacted by the Bankruptcy Act, 1883, that—

Discretionary power as to stay of proceedings.

Sect. 10. "(2.) The Court may at any time after the presentation of the bankruptcy petition stay any action, execution, or other legal process against the property or person of the debtor, and any Court in which proceedings are pending against a debtor may, on proof that a bankruptcy petition has been presented by or against the debtor, either stay the proceedings or allow them to continue on such terms as it may think just."

Extent of this jurisdiction.

But this jurisdiction is not intended to affect or interfere with the rights of a mortgagee to realize his security by the exercise of his remedies at law, or in equity, and does not give to the Bankruptcy Court any authority to restrain the mortgagee from proceeding with an action in the Chancery Division to establish and enforce his right to foreclose (*c*).

Jurisdiction of Chancery Division to order foreclosure not excluded.

The mortgagee may, therefore, instead of proceeding in bankruptcy, proceed in the Chancery Division against the trustee for the purpose of having the security realized, the jurisdiction in that Division not being taken away either by the Bankruptcy Act, 1869, or by the Act of 1883 (*d*). But

(*a*) 46 & 47 Vict. c. 52, s. 92.

(*b*) *Ibid.* s. 94 (i), (ii).

(*c*) *Exp. Hirst, Re Wherly*, 11 Ch. D. 278. See *Exp. Bayly, Re Hart*, 15 Ch. D. 223, C. A.; *Sharp* v. *McHenry*, 55 L. T. 747. See as to action by a mortgagee to realize his security on property in a British colony, *Exp. Rogers, Re Boustead*, 16 Ch. D. 665, C. A.

(*d*) *White* v. *Simmons*, L. R. 6 Ch. 555; *Ellis* v. *Silber*, L. R. 8 Ch. 83; *Jenny* v. *Bell*, 2 Ch. D. 547.

the Chancery Division will not generally exercise its jurisdiction, except in cases where the Court in bankruptcy is unable to give adequate relief (*e*). Where, in a creditor's action for the administration of the estate of a deceased compounding debtor, certain secured creditors claimed to value their securities and prove for the deficiency, which claim had been admitted by the trustee in the composition; it was held that, in strictness, the applicants ought to proceed in bankruptcy, but, the plaintiffs consenting, the claims were allowed (*f*).

Grounds on which Bankruptcy Court will interfere.

The Bankruptcy Court will, however, interfere where the trustee has, by the operation of the law of bankruptcy, a higher and better title than the bankrupt himself, and that even though the trustee impugns the validity of the security (*g*). And this power can only be properly exercised where the Court is competent to give complete relief (*h*). A mortgagee, therefore, cannot generally be restrained from proceeding in the Chancery Division to foreclose his mortgage, this being a remedy which the Court in bankruptcy cannot give (*i*); but the parties may submit to the bankruptcy jurisdiction (*k*), in which case there will be the usual six months in which to redeem (*l*).

Trustee of bankrupt mortgagee may foreclose.

The trustee of a bankrupt mortgagee may bring an action of foreclosure in the Chancery Division against the trustee of the bankrupt mortgagor, and need not apply in bankruptcy (*m*).

This rule applies to equitable no less than to legal mortgagees. So where a second equitable mortgagee commenced an action in the Chancery Division against the first mortgagee and the trustee of the bankrupt mortgagor to redeem and foreclose, an injunction by the Bankruptcy Court was discharged (*n*).

Where an action is brought by the mortgagee against the trustee in the Chancery Division, the Court of Bankruptcy will

(*e*) *Stone* v. *Thomas*, L. R. 5 Ch. 219.

(*f*) *Re Hardy, Hardy* v. *Farmer*, (1896) 1 Ch. 904.

(*g*) *Re Champagnè, Exp. Kemp*, W. N. (1893) 153; *Re Pollard*, (1903) 2 K. B. 41, C. A.

(*h*) *Exp. Rumboll*, L. R. 6 Ch. 842; *White* v. *Simmons*, L. R. 6 Ch. 555.

(*i*) *White* v. *Simmons, sup.;* but see *inf.* p. 1116.

(*k*) *Exp. Fletcher, Re Hart*, 9 Ch. D. 381, C. A.; *Exp. Davies, Re Sadler*, 19 Ch. D. 86.

(*l*) *Exp. Fletcher, Re Hart*, 10 Ch. D. 610, C. A.; *Re Salmon, Exp. Trustee*, (1903) 1 K. B. 147.

(*m*) *Waddell* v. *Toleman*, 9 Ch. D. 212.

(*n*) *Exp. Hirst, Re Wherly*, 11 Ch. D. 278.

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not order the mortgagee to deliver up the deeds unless he is paid off, even upon an allegation of fraud (*o*).

Restraint on action for foreclosure.

Under special circumstances, however, the Court of Bankruptcy will restrain a secured creditor from pursuing his remedies in the High Court. So, where a mortgagee commenced an action in Chancery for foreclosure after the trustee in the bankruptcy of the mortgagor had entered into a provisional contract for the sale of the mortgaged property upon very advantageous terms, the registrar made an order for sale and restrained the mortgagee from proceeding with his suit in Chancery; and the order was affirmed in this respect by the Court of Appeal (*p*).

But a sale by a mortgagee under his mortgage deed is not a legal process which can be restrained under sect. 10 of the Act of 1883 (*q*).

Mortgagee in possession.

Where a mortgagee is in possession, an injunction will not be granted on the mere possibility of the trustee finding out something to invalidate the mortgage; in order to justify such an interference with the legal rights of the mortgagee, the applicant for the injunction must swear that, to the best of his belief, there are facts which, if established, would invalidate the deed (*r*).

Objection to jurisdiction.

The objection to the jurisdiction of the Court of Bankruptcy to restrain proceedings in another Court should be taken at the earliest opportunity (*s*). But the Court may at any time, if it thinks fit, refuse to exercise its jurisdiction (*t*).

Foreclosure.

It is doubtful whether the Court of Bankruptcy has jurisdiction to make an order for foreclosure (*u*); but where an equitable mortgagee came in and submitted to the jurisdiction, an order was made for delivery to him of the property comprised in his security, unless the trustee in the bankruptcy should redeem him by a short date (*x*). And by consent the usual foreclosure decree has been made (*y*). But the Court

(*o*) *Exp. Pannell, Re England*, 6 Ch. D. 335, C. A. See also *Exp. Ditton, Re Woods*, 1 Ch. D. 557, C. A.

(*p*) *Exp. Ditton, Re Woods, sup.*; but see *Exp. Reynolds*, 15 Q. B. D. 169.

(*q*) *Re White & Co.*, 1 Mor. p. 80.

(*r*) *Exp. Bayly, Re Hart*, 15 Ch. D. 223, C. A.

(*s*) *Exp. Swinbanks, Re Shanks*, 11 Ch. D. 525, C. A.; *Exp. Butters, Re Harrison*, 14 Ch. D. 265, C. A.

(*t*) *Exp. Swinbanks, Re Shanks, sup.*

(*u*) *White* v. *Simmons*, L. R. 6 Ch. at p. 558.

(*x*) *Exp. Fletcher, Re Hart*, 9 Ch. D. 381; 10 Ch. D. 610, C. A.

(*y*) *Re Salmon, Exp. Trustee*, (1903) 1 K. B. 147.

refused to exercise jurisdiction on a motion which was in effect an application for redemption (*z*).

Accounts.

As between the mortgagor and mortgagee, or the trustee of either of them, the Court of Bankruptcy may order all such inquiries and accounts to be taken in like manner as in the Chancery Division (*a*).

ii. Effect of Receiving Order on Rights of Secured Creditors.—By the Bankruptcy Act, 1883 (*b*), it is enacted that:—

Effect of receiving order.

Sect. 9. "(1.) On the making of a receiving order, an official receiver shall be thereby constituted receiver of the property of the debtor, and thereafter, except as directed by this Act, no creditor, to whom the debtor is indebted in respect of any debt provable in the bankruptcy, shall have any remedy against the property or person of the debtor in respect of the debt, or shall commence any action or other legal proceedings, unless with the leave of the Court and on such terms as the Court may impose.

"(2.) But this section shall not affect the power of any secured creditor to realize or otherwise deal with his security in the same manner as he would have been entitled to realize or deal with it if this section had not been passed."

Definition of expression "secured creditor."

By sect. 168 of the Act, the expression "secured creditor" is defined as meaning "a person holding a mortgage, charge, or lien on the property of the debtor, or any part thereof, as a security for a debt due to him from the debtor."

Equitable mortgagee by deposit.

So an equitable mortgagee by deposit of deeds is a "secured creditor" within the meaning of the Bankruptcy Acts (*c*).

Security must be subsisting at date of bankruptcy.

A "secured creditor" within the meaning of sect. 9 is a creditor who holds a security for his debt at the date of the bankruptcy (*d*).

Property charged must be in existence at date of bankruptcy.

The property charged, or agreed to be charged, must be in existence at the commencement of the bankruptcy. So where a trader assigned for value the future profits of his business, it was held that, as regards profits accrued after the commencement of his subsequent bankruptcy, the assignee was not a secured creditor (*e*). But a distinction has been taken in the case of an assignment of a debt due at the commencement of the bankruptcy, but not payable till afterwards (*f*).

(*z*) *Exp. Hutchinson,* 47 L. T. 483.
(*a*) Bankruptcy Rules, 77.
(*b*) 46 & 47 Vict. c. 52, s. 9.
(*c*) *Exp. Mountfort,* 14 Ves. 606.
(*d*) *Quartermaine's Case,* (1892) 1 Ch. 639, 641 (winding-up).
(*e*) *Exp. Nicholls, Re Jones,* 22 Ch. D. 782.
(*f*) *Re Davis & Co., Exp. Raw-*

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Mortgagee's right to realize security for loan to partnership.

The right of a mortgagee to realize or otherwise deal with his security was held not to be affected by the fact that the mortgage was to secure a loan made by him to a partnership firm of which he was a member, with interest varying with the profits of the business (*g*); but, in such a case, if the amount realized by sale of the mortgaged property is not sufficient to pay the debt in full, the mortgagee will not be allowed to prove for the balance until the other creditors have been paid in full (*h*).

Courses open to mortgagee.

A mortgagee, on the bankruptcy of his mortgagor, has several courses open to him. He may either (1) rest on his security; or (2) surrender his security and prove for the whole debt; or (3) realize his security and prove for the deficiency, if any; or (4) put a value on his security and prove for the balance.

Mortgagee may rest on security.

First, then, a mortgagee may rest on his security and compel the trustee in the bankruptcy to redeem him or be foreclosed.

Creditor not compellable to give up securities.

A majority of the creditors cannot compel a dissentient creditor to give up securities which he holds and accept something else instead (*i*).

Creditor not valuing security, &c., does not lose benefit thereof.

There is no rule in bankruptcy that a petitioning creditor, who omits in his petition either to give an estimate of the value of his security, or to state that he will be ready to give up his security for the benefit of the creditors in the event of his debtor being adjudicated bankrupt, thereby forfeits the benefit of his security (*k*). But if he gives an estimate the trustee is not entitled to redeem the security at that value (*l*).

Mortgagee may surrender security and prove for whole debt.

Secondly, the mortgagee may surrender his security to the official receiver or trustee for the general benefit of creditors; and if he adopts this course he may prove in the bankruptcy for his whole debt (*m*).

Statement of readiness to give up security.

A petitioning creditor having security, and being willing to give it up, should state the fact in his petition, but he may

lings, 22 Q. B. D. 193, 199, C. A. See *Exp. Moss, Re Toward*, 14 Q. B. D. 310.

(*g*) *Exp. Sheil, Re Lonergan*, 4 Ch. D. 789, C. A.; *Badeley* v. *Consolidated Bank*, 38 Ch. D. 238, C. A.

(*h*) 53 & 54 Vict. c. 53, s. 3.

(*i*) *Exp. Jones*, L. R. 10 Ch. 665; *Re Chidley*, 1 Ch. D. 177, 180, C. A.

(*k*) *Moor* v. *Anglo-Italian Bank*, 10 Ch. D. 681.

(*l*) *Re Button, Exp. Voss*, (1905) 1 K. B. 602.

(*m*) Bankruptcy Act, 1883, 2nd Sched. rule 10.

amend his petition by adding a statement of the particulars of his security and of his willingness to surrender it (*n*).

Surrender must be complete.

In order to entitle a creditor to prove for the whole debt, he must altogether surrender all benefit of his security. This rule prevents the creditor from retaining his security, and at the same time proving on a promissory note, part of the consideration for which was interest on a debt covered by the security (*o*).

Proof on securities of third persons indebted to bankrupt.

But a creditor holding securities of third persons, indebted to the debtor, of greater value than the amount due from the bankrupt to himself, may prove and receive dividends upon the full amount of the securities to the extent of twenty shillings in the pound upon the actual debt (*p*).

Surrender will not prejudice claim against surety.

The surrender of the security will not prejudice any claim which the mortgagee may have on a surety for the debt (*q*).

Security of surety need not be surrendered.

The creditor is not bound to elect where the security is not on the estate of a bankrupt, but of a surety (*r*). In such cases the proper course, having regard to the equity of the surety, is for the creditor to prove first for his whole debt against the estate of the bankrupt debtor, and then to come upon the surety for the deficiency, on the ground that if the principal security be first realized, and the surety have paid nothing before the bankruptcy, he cannot prove in respect of his loss, even on bringing an action (*s*); but it would seem that a surety can now prove on a payment made after the bankruptcy (*t*).

Creditor may retain separate security of one of several co-debtors, and prove against joint estate.

It has been seen that "secured creditor" means a creditor holding a security "over the property of the debtor" (*u*); it follows that only such securities need be taken into account in reduction of proof for the whole debt or balance, as the case may be. Thus, where the debt is joint, if the creditor has a security over the separate estate, he is entitled to prove against the joint estate, without giving up his security, on the ground

(*n*) *Exp. Vanderlinden, Re Pogose*, 20 Ch. D. 289, C. A.

(*o*) *Exp. Clarke*, 1 M. D. & De G. 622; and see *Baines* v. *Wright*, 16 Q. B. D. 330.

(*p*) *Re Bloxham*, 6 Ves. 449. See *Exp. Bennett*, 2 Atk. 527; *Exp. Goodman*, 3 Madd. 373; *Exp. Parr*, 18 Ves. 55; *Exp. Schofield*, 12 Ch. D. 337, C. A.

(*q*) *Rainbow* v. *Juggins*, 5 Q. B. D. 422.

(*r*) *Exp. Thornton*, 3 De G. & J. 454; *Exp. Goodman*, 3 Madd. 373; *Exp. Hedderly, Re Hicklin*, 2 M. D. & De G. 487; *Exp. Brett*, L. R. 6 Ch. 838.

(*s*) See *Kittier* v. *Raynes*, 1 Cox, 105.

(*t*) See *Breslauer* v. *Brown*, 3 App. Ca. 672.

(*u*) See *ante*, p. 1117.

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that it is a different estate (*x*). So in a composition, one of the joint creditors of a partnership, whose debt was collaterally secured by an equitable mortgage by deposit upon the property of one of the partners, was held to be entitled to prove for his whole debt against the joint estate without giving up his security (*y*).

Security on separate estate undervalued.

Where a creditor under the Bankruptcy Act, 1869, by mistake included in the valuation a security on the separate estate, as well as a joint security, and the two securities realized more than the valuation, the trustee was held entitled to the excess (*z*).

On the principle above stated, it was held that where a father and son were jointly and severally liable, and the father mortgaged, as further security, his real estate, which descended to the son, the mortgagee was held entitled to prove in the son's bankruptcy, without giving up his security (*a*); but the contrary was held in the case of a devised estate (*b*).

So where a bankrupt and his wife executed a power of appointment of the wife's estate as security for a debt due from the bankrupt, it was held that the creditor was entitled to prove for the whole debt without giving up the security (*c*).

Similarly, where trust money was drawn out of a bank by one of the partners who was interested therein, and placed upon an unauthorized security, the *cestuis que trust* had a right to prove against the bankrupt's estate without giving up the security (*d*).

But where securities, though apparently belonging to the separate estate of a partner, are really the joint property of the firm, the creditor must give up the securities before proving against the joint estate (*e*).

So, the interest of partners, where real estate is purchased with partnership moneys, and mortgaged by the firm for a joint

(*x*) *Exp. Shepherd, Re Plumer*, 1 Ph. 56; *Bank of Australasia* v. *Flower, &c. Co.*, L. R. 1 P. C. 29; *Exp. Ogle*, L. R. 8 Ch. 711; *Exp. Caldicott*, 25 Ch. D. 716, C. A. See *Exp. West Riding Union Banking Co., Re Turner*, 19 Ch. D. 105, C. A.

(*y*) *Exp. Manchester and Liverpool District Banking Co., Re Littler*, L. R. 18 Eq. 249.

(*z*) *Couldery* v. *Bartrum*, 19 Ch. D. 394, C. A.

(*a*) *Exp. Turney*, 3 M. D. & De G. 576.

(*b*) *Exp. Bowden, Re Brettell*, 1 D. & C. 135.

(*c*) *Exp. Hedderly, Re Hicklin*, 2 M. D. & De G. 487.

(*d*) *Exp. Biddulph*, 3 De G. & S. 587.

(*e*) *Exp. Connell*, 3 Deac. 201.

debt, is a joint security, though the conveyance was made to the partners as tenants in common (*f*).

Joint and several covenant.

Conversely, where there is a joint and several covenant to pay, the creditor may prove against the separate estate of each partner without surrendering a mortgage to secure the debt on the joint property of the partnership (*g*).

Joint security after dissolution.

But where, on the bankruptcy of a partner after dissolution, a creditor sought to prove without deducting the security on property of both partners, as being a joint security, the creditor was only allowed to prove on deducting a moiety of the property, as the security was on each moiety, and not joint (*h*).

There must be separate debt.

Though a creditor is entitled to the benefit of a separate security given by a partner for a joint debt, yet, if the partner becomes bankrupt, the other partners remaining solvent, the creditor will not be allowed to prove against the separate estate, there being no separate debt (*i*).

Election between joint and separate estates.

A joint and separate creditor must elect against which estate he will go in the first instance; and, if he elect to go against the joint estate, he has no preference against the other joint creditors upon the surplus of the separate estate beyond the separate debts (*k*).

What amounts to abandonment of security.

The proving of the debt, without disclosing the security, is an election to abandon it (*l*), and the creditor after proof in ignorance of a lien was not allowed to reduce his proof and set up the lien (*m*).

Dispute as to title of mortgagee.

Where, however, the validity of the security is in dispute, a mortgagee may be allowed to enter a claim to prove for the whole amount of his debt, subject to the determination of the question of right (*n*).

Partial proof.

Partial proof is no election to give up the security (*o*).

Proof for whole debt.

If a creditor votes for his whole debt without stating his security in his proof, he will generally be deemed to have aban-

(*f*) *Exp. Free*, 2 Gl. & J. 250.
(*g*) *Exp. Shepherd, Re Plumer*, 1 Ph. 56; *Bank of Australasia* v. *Flower, &c. Co.*, L. R. 1 P. C. 27. See *Exp. English and American Bank*, L. R. 4 Ch. 49.
(*h*) *Exp. West Riding Union Banking Co., Re Turner*, 19 Ch. D. 105, C. A.
(*i*) *Exp. Leicestershire Banking Co.*, De G. 292; *Exp. Lloyd*, 3 Deac. 305; *Exp. Biddulph*, 3 De G. & S. 587.
(*k*) *Exp. Bevan*, 10 Ves. 107.
(*l*) *Exp. Rolfe*, 2 Deac. 421; *Re Balbirnie*, 3 Ch. D. 488, C. A.
(*m*) *Exp. Spottiswoode*, Fonb. Bky. 20.
(*n*) *Exp. Bignold*, 1 Deac. 515.
(*o*) *Elder* v. *Beaumont*, 4 Jur. N. S. 23.

doned his security (*p*). The question has not yet been decided whether, if a creditor who states his security afterwards votes for his whole debt, this amounts to an abandonment of the security (*q*).

Effect of surrender.

Where a first mortgagee gives up his security, the effect is to put the trustee in his place, and not to accelerate the rights of subsequent mortgagees (*r*).

Right to prove on failure of security.

Where the creditor has neither proved nor assessed the value of his security, and it turns out afterwards that his security was of no value, he may prove, giving up his security, and not disturbing previous distribution (*s*).

Retractation of surrender.

A secured creditor will be relieved from being deemed to have surrendered his security, and will be allowed to withdraw his proof, unless it clearly appears that he has deliberately and purposely abandoned his security (*t*). But a creditor, having once made his election to give up his securities, cannot afterwards retract (*u*).

Return of securities if bankruptcy annulled.

A creditor who surrenders to the trustee his securities must be taken to do so on the footing that the bankruptcy will be prosecuted so as to give him a right to prove therein; and, accordingly, if the bankruptcy is annulled, he is entitled to a return of his securities (*x*).

Mortgagee may realize security and prove for balance.

Thirdly, a mortgagee, having power to sell the property comprised in his security, may realize it by sale without applying to the Court, or he may apply to have his security realized under an order of the Court, whether he has a power of sale or not (*y*). If a secured creditor realizes his security, he may prove for the balance due to him after deducting the net amount realized (*z*).

Rule applies to compositions.

This rule also applies to a composition, so that a secured creditor need not take any part in the composition proceeding; but when he has realized his security he may prove his debt,

(*p*) See Bankruptcy Act, 1st Sched. r. 10.

(*q*) *Exp. Wood, Re Wright*, 10 Ch. D. 554, C. A.: *Rainbow* v. *Juggins*, 5 Q. B. D. 138.

(*r*) *Cracknell* v. *Janson*, 6 Ch. D. 735.

(*s*) *Re Kit-Hill Tunnel, Exp. Williams*, 16 Ch. D. 590 (winding-up).

(*t*) *Re Burr, Exp. Clarke*, 67 L. T. 232, C. A.

(*u*) *Exp. Downes*, 18 Ves. 290; *Exp. Solomon*, 1 Gl. & J. 25; *Exp. Hornby*, Buck. 351; *Grugeon* v. *Gerrard*, 4 Y. & C. Ex. 119, 131.

(*x*) *Exp. Morris, Re Tyrie*, 14 L. T. N. S. 606.

(*y*) See as to sales under order of Court in bankruptcy, *post*, pp. 1131 *et seq.*

(*z*) Rule 9.

and receive the composition upon the balance which remains due to him (*a*).

Proving for deficiency.

If part of the debt have been realized by sale under a decree, and the remainder of the security be unsaleable, the mortgagee may prove for the deficiency, upon giving up the remaining benefit of the decree (*b*). So it seems he may come in and prove if the security fail before the estate is distributed (*c*). And a creditor who has a mortgage for a principal sum, and a further charge secured by the same and other securities, may retain the mortgage for the original debt and prove for the other debts, upon giving up all the other securities (*d*).

Postponement of charge at request of bankrupt.

If a second mortgagee postpones his security to a further advance by the first mortgagee, and on a sale of the property by, or at the instance of, the first mortgagee, the proceeds are not sufficient to satisfy the postponed charge, the second mortgagee may prove in the bankruptcy of the debtor for the deficiency on the ground of an implied promise by the debtor to indemnify him against any loss arising from the postponement (*e*).

Mortgagee may put a value on security and prove for balance.

Fourthly, the mortgagee may put a value on his security, and after deducting such value from the amount of his debt, he may prove for the balance along with the other creditors. The trustee may then redeem at the assessed value (*f*) or he may call for a sale (*g*), and thereafter the net amount realized by the sale is substituted for the assessed value for all purposes (*h*). The creditor may give six months' notice to the trustee to elect to exercise the above powers, and if the trustee fails so to do, the equity of redemption will vest in the creditor (*i*).

It is enacted by the Bankruptcy Act, 1883, that:—

Estimate of security by petitioning creditor.

Sect. 6 (2). "If the petitioning creditor is a secured creditor, he must, in his petition, either state that he is willing to give up his security for the benefit of the creditors in the event of the debtor being adjudged bankrupt, or give an estimate of the value of his security. In the latter case, he may be admitted as a petitioning creditor to the extent of the balance of the debt due

(*a*) *Re Bestwick, Exp. Bestwick,* 2 Ch. D. 485, C. A. See *Bolton v. Ferro,* 14 Ch. D. 171.

(*b*) *Exp. Wyly,* Vern. & Scriv. 518; *Exp. Greaves,* De G. 119.

(*c*) *Exp. Peake, Re Brodie,* L. R. 2 Ch. 453.

(*d*) *Re Allison,* Fonb. Bky. 26.

(*e*) *Exp. Ford, Re Chappell,* 16 Q. B. D. 305, C. A.

(*f*) Rule 12 (a), set out *inf.*

(*g*) Rule 12 (b), set out *inf.*

(*h*) Rule 15, set out *inf.*

(*i*) Rule 12 (c), set out *inf.*

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to him, after deducting the value so estimated in the same manner as if he were an unsecured creditor."

The estimate is binding on the creditor for the purposes of proof (*k*).

The penalty of non-compliance with the requirements of this section is exclusion from proof, not forfeiture of the security (*l*).

Bankruptcy rules as to estimates.

The Second Schedule to the Act sets out the following rules which are to be complied with if this course is adopted.

R. 11. "If a secured creditor does not either realize or surrender his security, he shall, before ranking for dividend, state in his proof the particulars of his security, the date when it was given, and the value at which he assesses it, and shall be entitled to receive a dividend only in respect of the balance due to him after deducting the value so assessed."

R. 12. "(a) Where a security is so valued, the trustee may at any time redeem it, on payment to the creditor of the assessed value.

"(b) If the trustee is dissatisfied with the value at which a security is assessed, he may require that the property comprised in any security so valued be offered for sale at such times and on such terms and conditions as may be agreed on between the creditor and the trustee, or as, in default of such agreement, the Court may direct. If the sale be by public auction the creditor, or the trustee on behalf of the estate, may bid or purchase.

"(c) Provided that the creditor may at any time, by notice in writing, require the trustee to elect whether he will or will not exercise his power of redeeming the security or requiring it to be realized, and if the trustee does not, within six months after receiving the notice, signify in writing to the creditor his election to exercise the power, he shall not be entitled to exercise it; and the equity of redemption, or any other interest in the property comprised in the security which is vested in the trustee, shall vest in the creditor, and the amount of his debt shall be reduced by the amount at which the security has been valued."

R. 13. "Where a creditor has so valued his security, he may at any time amend the valuation and proof on showing to the satisfaction of the trustee, or the Court, that the valuation and proof were made *bonâ fide* on a mistaken estimate, or that the security has diminished or increased in value since its previous valuation: but every such amendment shall be made at the cost of the creditor, and upon such terms as the Court shall order, unless the trustee shall allow the amendment without application to the Court."

R. 14. "Where a valuation has been amended in accordance with the foregoing rule, the creditor shall forthwith repay any surplus dividend which he may have received in excess of that

(*k*) *Post*, p. 1126.
(*l*) *Moor* v. *Anglo-Italian Bank*, 10 Ch. D. 681.

to which he would have been entitled on the amended valuation, or, as the case may be, shall be entitled to be paid out of any money for the time being available for dividend, any dividend or share of dividend which he may have failed to receive by reason of the inaccuracy of the original valuation, before that money is made applicable to the payment of any future dividend, but he shall not be entitled to disturb the distribution of any dividend declared before the date of the amendment."

R. 15. "If a creditor, after having valued his security, subsequently realizes it, or if it is realized under the provisions of rule 12, the net amount realized shall be substituted for the amount of any valuation previously made by the creditor, and shall be treated in all respects as an amended valuation made by the creditor."

R. 16. "If a secured creditor does not comply with the foregoing rules, he shall be excluded from all share in any dividend."

R. 17. "Subject to the provisions of rule 12, a creditor shall in no case receive more than twenty shillings in the pound and interest as provided by this Act."

Right of mortgagee to vote.

With regard to the right of mortgagees to vote at meetings of creditors, the First Schedule to the Bankruptcy Act, 1883, provides as follows:—

R. 10. "For the purpose of voting, a secured creditor shall, unless he surrenders his security, state in his proof the particulars of his security, the date when it was given, and the value at which he assesses it, and shall be entitled to vote only in respect of the balance (if any) due to him, after deducting the value of his security. If he votes in respect of his whole debt he shall be deemed to have surrendered his security, unless the Court on application is satisfied that the omission to value the security has arisen from inadvertence."

Voting for composition.

If a secured creditor votes in favour of a composition, without preferring any claim as a secured creditor, he will be deemed to have abandoned his security (*m*). But a creditor of a partnership firm may vote in respect of his whole debt for a composition by the firm, and yet retain a separate security held by him on the estate of one of the partners (*n*).

Evidence of right to vote.

It is sufficient for a mortgagee, in order to establish his right to vote, to produce the mortgage deed, without producing the title deeds to the mortgaged property (*o*).

(*m*) *Re Balbirnie, Exp. Jameson*, 3 Ch. D. 488.

(*n*) *Exp. Manchester and Liverpool Bank, Re Littler*, L. R. 18 Eq. 249.

(*o*) *Exp. Cass, Re Dunkley*, 45 L. T. 560.

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A secured creditor is in no way bound by his debtor's estimate of the value of the security (*p*).

Creditor bound by estimate.

Where a petitioning creditor gives an estimate of the value of his security the Court is under no obligation, unless the estimate is a mere sham, to enquire into the real value of the security, and he is bound by the estimate if he comes in to prove (*q*).

Trustee entitled to redeem.

But the trustee in bankruptcy has no right to redeem the security at the value assessed by the petitioning creditor in his petition. The trustee's right to redeem is confined to cases where a creditor has proved for the purpose of voting or of ranking for dividend (*r*).

Assessment of several securities as a whole.

A creditor holding several securities for debts due from the bankrupt may assess them as a whole; and, unless the trustee elects within the prescribed time to redeem them as a whole at such assessed value, the property comprised in the securities so assessed will vest in the creditor (*s*).

Right of foreclosure notwithstanding estimate.

The assessment of the security by the mortgagee will not preclude him from bringing an action for foreclosure unless the trustee has previously elected to redeem the security; in such a case the trustee must plead the valuation of the security, or otherwise bring it to the notice of the Court before the usual order for foreclosure is made, in order that regard may be paid to the fact on taking the accounts; if this is not done at the hearing, the matter cannot be subsequently raised so as to deprive the mortgagee of the full benefit of the foreclosure order (*t*). It is too late for the trustee to redeem after judgment for foreclosure (*u*).

Mortgagee must pay over to trustee excess over estimate.

A secured creditor who assesses his security at an undervalue and proves for the balance of his debt, is bound to pay over to the trustee any excess realized from the security beyond the assessed value, even though the trustee does not object to the assessment, or offer to redeem (*x*).

If, however, a creditor who has undervalued his security can

(*p*) *Re Bestwick, Exp. Bestwick*, 2 Ch. D. 485, C. A.

(*q*) *Re Button, Exp. Voss*, (1905) 1 K. B. 602, C. A.

(*r*) *Re Vautin, Exp. Saffery*, (1899) 2 Q. B. 549; distinguishing *Exp. Taylor, Re Lacey*, 13 Q. B. D. 128; *Re Button, sup.*

(*s*) *Re Smith, Exp. Logan*, 72 L. T. 362.

(*t*) *Sanguinetti* v. *Stuckey's Banking Co.* (No. 2), (1896) 1 Ch. 502.

(*u*) *Ibid.*

(*x*) *Exp. King, Re Palethorp*, L. R. 20 Eq. 273; *Société Générale de Paris* v. *Geen*, 8 App. Ca. 606.

satisfy the trustees or the Court that the assessment and proof were made *bonâ fide* on a mistaken estimate, he may amend his assessment and proof (*y*). A mortgagee may amend notwithstanding the opposition of a subsequent mortgagee (*z*).

Amendment of estimate.

A creditor may amend notwithstanding that the trustee has given notice of intention to redeem; but not, as it would seem, after the trustee has paid the assessed value to the creditor, or even definitely elected to redeem at the assessed value (*a*).

Leave to amend was refused where a creditor had received in full the estimated value of his security, and had proved for and accepted a composition on the balance (*b*).

Where the secured creditor has valued his security and proved for the difference, but his proof has been rejected, he is remitted to all his rights and can recover more than his valuation (*c*).

Effect of rejection of proof.

iii.—**Proof by Secured Creditors.**—Subject to the provisions of the Bankruptcy Act, all debts proved in a bankruptcy are to be paid *pari passu* (*d*).

Debts payable *pari passu*.

A secured creditor may prove at any time after he has valued or even without valuing his security, but not so as to disturb a previous dividend (*e*). Until, however, an unsurrendered security has been valued or realized, he has no debt provable in respect of which the trustee is bound to make any reserve on declaring a dividend (*f*).

Reservation of dividend by trustee.

So an annuity creditor who has a policy of insurance cannot prove until the policy has been sold (*g*).

Annuity secured by policy.

In estimating the amount of the balance for which a creditor who has valued or realized his security may prove, all costs, charges and expenses properly incurred in relation to the security, including costs of maintaining and protecting the same, are to be taken into account (*h*).

Proof for costs of maintaining security.

(*y*) Rr. 13—15, set out *sup.* See *Exp. Adamson, Re Collie*, 8 Ch. D. 107, C. A.; *Exp. Schofield, Re Firth*, 12 Ch. D. 337, C. A.; *Exp. Bagshaw, Re Ker*, 13 Ch. D. 304, C. A.; *Re Piers*, (1898) 1 Q. B. 627; *Re Safety Explosives, Ltd.*, (1904) 1 Ch. 226.

(*z*) *Exp. Arden*, 14 Q. B. D. 121.

(*a*) *Exp. Norris, Re Sadler*, 17 Q. B. D. 728, C. A.

(*b*) *Couldery* v. *Bartram*, 19 Ch. D. 394, C. A.

(*c*) *Williams* v. *Hopkins*, W. N. (1883) 53.

(*d*) 46 & 47 Vict. c. 52, s. 40 (4).

(*e*) *Re Kit-Hill Tunnel, Exp. Williams*, 16 Ch. D. 590. See *Re Safety Explosives*, (1904) 1 Ch. 226. As to proof by a petitioning creditor, see *ante*, p. 1123.

(*f*) *Exp. Good, Re Lee*, 14 Ch. D. 82.

(*g*) *Exp. Tierney*, 1 Mont. 78.

(*h*) *Exp. Carr, Re Hofman*, 11 Ch. D. 62.

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Proof on stock mortgage.

A secured creditor having a mortgage for the retransfer of stock may prove for the amount of the dividends due prior to the bankruptcy, and for the value of the stock at the date of the petition (*i*).

Mortgagee realizing security entitled to payment in full out of proceeds, if sufficient.

A mortgagee who has realized his security on the bankruptcy of the mortgagor is entitled to apply the proceeds of sale, if sufficient for the purpose, in payment to himself of the full amount of his debt with interest and costs, handing over the surplus, if any, to the trustee in the bankruptcy for the benefit of the creditors generally.

Proof for deficiency.

If, however, the proceeds of sale are insufficient, or if the mortgagee assesses his security, and, in either case, claims to prove for the residue, or if he abandons his security and claims to prove for the whole debt, the question arises what his rights are as regards proof for interest.

Interest after receiving order not allowed unless there is surplus.

In all these cases, the general rule is that the mortgagee cannot charge interest beyond the date of the receiving order until there is a surplus (*k*), and this applies to a mortgage to a building society where instalments are made up partly of principal and partly of interest (*l*), and interest wrongly paid must be refunded (*m*); but interest after the receiving order may be paid out of profits arising from the security after that date (*n*); and, under special circumstances, as where the mortgagee has postponed the sale at the request of the assignees, or has made some special agreement, interest after the receiving order may be allowed (*o*).

Proof for arrears of interest due at date of receiving order.

A mortgagee may, however, prove for interest overdue at the date of the receiving order, such interest being calculated, for the purposes of dividend, at the rate at which interest is reserved by the mortgage, if not exceeding five per cent., or otherwise at five per cent., without prejudice to his right to receive the higher rate of interest in full out of surplus, if any (*p*); or if interest is not reserved by the mortgage (*q*),

(*i*) *Exp. Day*, 7 Ves. 301; and see *Exp. Fisher, Re Barker*, 3 Madd. 150.

(*k*) *Exp. Badger*, 4 Ves. 165; *Exp. Lubbock*, 4 De G. J. & S. 516; *Exp. Kensington*, 2 M. & A. 302; *Quartermaine's Case*, (1892) 1 Ch. 639.

(*l*) *Exp. Bath, Re Phillips*, 22 Ch. D. 450, C. A.

(*m*) *Exp. Lubbock*, 4 De G. J. & S. 516.

(*n*) *Quartermaine's Case*, (1892) 1 Ch. 639.

(*o*) *Exp. Kensington*, 2 M. & A. 300. But see *Exp. Pollard*, 1 M. D. & De G. 270; *Exp. Burrell*, 3 M. & A. 440. See *Re Savin*, L. R. 7 Ch. 760 (in liquidation).

(*p*) 53 & 54 Vict. c. 71, s. 23.

(*q*) See as to this, *ante*, p. 1012.

then at a rate not exceeding four per cent. from the time when the principal was payable (*r*).

By sect. 40 of the Bankruptcy Act, 1883, it is enacted that—

Payment of subsequent interest out of surplus.

"(5.) If there is any surplus after payment of the foregoing debts (*s*), it shall be applied in payment of interest from the date of the receiving order at the rate of four pounds per centum per annum on all debts proved in the bankruptcy."

Realized or assessed value of security may be allocated to payment of interest.

Where a mortgagee has realized or valued his security at an amount insufficient for full payment of his principal, interest and costs, he may allocate the realized or estimated value of his security to such part of his debt as he may think proper, so that he is entitled to pay or allow himself in account out of such value, in the first place, the full amount of the interest due to him up to the date of the order for adjudication, for which he could not prove, and in the next place, so much of the principal as such realized or estimated value is sufficient to meet, and then to prove for the balance of such principal *pari passu* with the other creditors (*t*). And it makes no difference in this respect whether the mortgagee has valued or realized his security (*u*).

Distinction where security realized by Court.

Interest after receiving order.

But where a mortgagee invokes the aid of the Court of Bankruptcy to realize his security, the right of allocation does not arise, and in such a case a secured creditor cannot apply the moneys produced by realizing his security in payment of interest accrued due after the date of the receiving order, so as to increase his proof (*x*): his proof must therefore be limited to what was due for principal and interest at the commencement of the bankruptcy after deducting therefrom the proceeds of sale received in respect of the security. But the mortgagee is entitled, in such a case, to set off profits realized from his security after the date of the receiving order in keeping down the subsequent interest (*y*).

Income during proceedings in Chancery.

And where mortgagees realized their security by proceedings in Chancery and proved for the deficiency, they were allowed to

(*r*) 46 & 47 Vict. c. 52, 2nd Sched. r. 20.

(*s*) *I.e.*, "debts proved in the bankruptcy." See sub-sect. 4.

(*t*) *Re Fox and Jacobs*, (1894) 1 Q. B. 438, 442. See *Re Holland, Exp. Parker and Young*, 71 L. T. 435.

(*u*) *Re Fox and Jacobs*, *sup.* at p. 441.

(*x*) *Re Bonacino, Exp. Discount Banking Co.*, 1 Mans. 59.

(*y*) *Re London, Windsor, and Greenwich Hotels Co., Quartermaine's Case*, (1892) 1 Ch. 639 (winding-up).

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apply the income arising from their security subsequent to the bankruptcy towards paying interest on their debt during the same period (*z*).

Right of mortgagee in possession to interest.

If the mortgagee is in possession of the premises, though he cannot prove for the interest, yet he may calculate interest as against his security up to the time of taking the accounts (*a*).

Security by way of indemnity.

In the case of a security by way of indemnity, proof for interest will be allowed up to the time of payment (*b*).

Proof against bankrupt assignee of equity of redemption.

Apart from special circumstances there is no right of proof against the estate of an assignee of an equity of redemption for arrears of interest on the mortgage debt, nor will the mere fact of payment by the assignee of interest be sufficient to create such a right (*c*).

Debts payable at future time.

With regard to debts payable at a future time, the proper course is, first, to prove the debt as a present debt and apply r. 21, so as to deduct a rebate of interest at 5 per cent. from the dividends upon it, and then to value the liability to pay interest and prove for that value, and pay a dividend on that without rebate. If by contract the debt bears interest at 5 per cent., then as, under the rule, interest is to be calculated at 5 per cent. for the purposes of rebate, the result will be the same as if the principal sum is treated as a present debt not bearing interest, and is proved and paid accordingly. But where the interest is more or less than 5 per cent., the value of the liability to pay interest and the rebate under the rule will not be equal, and will not therefore neutralize each other. It would seem to follow, though some doubt was expressed upon the point in that case, that if the interest contracted for is more than 5 per cent., the proof for future interest would be allowed for the amount beyond the rebate (*d*).

Rights of secured creditors under a composition.

It remains to consider briefly the rights and position of a mortgagee where a sufficient majority of the creditors, with the approval of the Court, have passed a resolution to accept a debtor's proposal for a composition, instead of proceeding to an adjudication in bankruptcy (*e*).

(*z*) *Exp. Penfold*, 4 De G. & S. 282.

(*a*) *Exp. Ramsbottom*, 2 M. & A. 79.

(*b*) *Exp. Pollard*, 1 M. D. & De G. 270; *Exp. Lubbock*, 4 De G. J. & S. 516.

(*c*) *Re Errington, Exp. Mason*, (1894) 1 Q. B. 11.

(*d*) *Re Browne and Wingrove, Exp. Ador*, (1891) 2 Q. B. 574, C. A.

(*e*) Proceedings for a composition or scheme of arrangement are now regulated by sect. 3 of the Bankruptcy Act, 1890 (53 & 54 Vict. c. 71).

A mortgagee need not take any active part in the composition proceedings, but having realized or valued his security, he may then come in and prove for the deficiency, if any (*f*). But he can only hold his security for the amount at which he valued it, and he may be redeemed on that footing (*g*). Although a secured creditor may amend his valuation and come in after part payment of the composition, he will not be allowed to claim instalments already paid (*h*). If a secured creditor chooses to vote for a composition without deducting the value of his security, he will be deemed to have forfeited it, unless the Court is satisfied that the omission to value arose from inadvertence (*i*).

Effect of composition.

A composition duly accepted and approved binds all the creditors so far as relates to any debts due to them from the debtor and provable in bankruptcy (*k*); but is not binding on any creditor so far as regards a debt or liability from which the debtor would not be discharged by an order of discharge in bankruptcy, unless the creditor assents thereto (*l*).

Bankruptcy Rules, 1890.

iv.—**Sale in Bankruptcy.**—With regard to the power of the Court of Bankruptcy to order a sale of mortgaged property of a bankrupt, the Bankruptcy Rules, 1890, provide as follows:—

Inquiry into mortgage, &c.

R. 73. "Upon application by motion by any person claiming to be a mortgagee of any part of the bankrupt's real or leasehold estate, and whether such mortgage shall be by deed or otherwise, and whether the same shall be of a legal or equitable nature, the Court shall proceed to inquire whether such person is such mortgagee, and for what consideration and under what circumstances; and if it shall be found that such person is such mortgagee, and if no sufficient objection shall appear to the title of such person to the sum claimed by him under such mortgage, the Court shall direct such accounts and inquiries to be taken as may be necessary for ascertaining the principal, interest, and costs due upon such mortgage, and of the rents and profits, or dividends, interest, or other proceeds received by such person, or by any other person by his order or for his use in case he shall have been in possession of the property over which the mortgage shall extend, or any part thereof, and the Court, if

(*f*) *Re Bestwick*, 2 Ch. D. 485; *Re Hardy, H.* v. *Farmer*, (1896) 1 Ch. 90.

(*g*) *Pearce* v. *Bullard*, (1908) 1 Ch. 780.

(*h*) *Re Marter, Exp. Nichols*, 76 L. T. 532.

(*i*) R. 10 of Sched. I. to Act.

(*k*) Bankruptcy Act, 1890, s. 3 (12).

(*l*) Bankruptcy Act, 1883, s. 19.

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satisfied that there ought to be a sale, shall direct notice to be given in such newspapers as the Court shall think fit, when and where, and by whom and in what way the said premises or property, or the interest therein so mortgaged, are to be sold, and that such sale shall be made accordingly, and that the trustee (unless it be otherwise ordered) shall have the conduct of such sale. But it shall not be imperative on any such mortgagee to make such application. At any such sale the mortgagee may bid and purchase."

Conveyance.

R. 74. "All proper parties shall join in the conveyance to the purchaser as the Court shall direct."

Proceeds of sale.

R. 75. "The moneys to arise from such sale shall be applied in the first place in payment of the costs, charges, and expenses of the trustee, of and occasioned by the application to the Court, and of such sale, and attendance thereat, and (in the next place) in payment and satisfaction, so far as the same shall extend, of what shall be found due to such mortgagee for principal, interest, and costs, and the surplus of the said moneys (if any) shall then be paid to the trustee. But in case the moneys to arise from such sale shall be insufficient to pay and satisfy what shall be so found due to such mortgagee, then he shall be entitled to prove as a creditor for such deficiency, and receive dividends thereon rateably with the other creditors, but so as not to disturb any dividend then already declared."

Proceedings on inquiry.

R. 76. "For the better taking of such inquiries and accounts, and making a title to the purchaser, all parties may be examined by the Court upon interrogatories, or otherwise as the Court shall think fit, and shall produce before the Court upon oath all deeds, papers, books, and writings in their respective custody or power relating to the estate or effects of the bankrupt, as the Court shall direct."

Accounts, &c.

R. 77. "In any proceedings between a mortgagor and mortgagee, or the trustee of either of them, the Court may order all such inquiries and accounts to be taken in like manner as in the Chancery Division of the High Court."

Down to 1852 the applications under the rules for which these are substituted were very numerous, but when by 15 & 16 Vict. c. 86, s. 48, the Court of Chancery was authorized to order a sale instead of foreclosure, a mortgagee desiring to realize his security usually proceeded in Chancery, where as plaintiff he usually had the conduct of the sale and the trustees' costs were postponed to his claim.

Who may apply for order for sale.

An application under these rules may be made by any person claiming to be a mortgagee, and should be made in any case if such claim is contested.

Mortgagee with power of sale may apply.

An application for a sale by a mortgagee whose mortgage deed gives to him expressly or by statute a power of sale is, in general, unnecessary, but the Court has jurisdiction upon

such an application, and may order a sale if it is for the benefit of the bankrupt's estate (*m*); and the mortgagee may waive his special power of sale, and apply to the Court for an order for sale in his general character of mortgagee (*n*). A sale by order of the Court gives to the mortgagee some advantages over a sale in exercise of his power; for the mortgagee, selling under his power, cannot purchase, or employ any person to purchase, the property on his own account, which he may do at a sale by order of the Court (*o*); but if a mortgagee, selling under his power, buys, the Court will order the property to be put up again, at the price bid by the mortgagee; and if no more is offered it will hold him to his bargain (*p*). The same incapacity to purchase applies also to any creditor having a pledge, who sells it independently of the Court.

Privity of contract necessary.

There must be privity of contract between the owner of the equity of redemption and the mortgagee in order to entitle the latter to the usual order for sale. So, where the bankrupt was a purchaser of the equity of redemption, and not personally liable for the debt to the mortgagee, an order for sale was refused on the ground that there was no contract between the mortgagee and the bankrupt (*q*).

Sub-mortgagees, &c.

A sub-mortgagee may, on the bankruptcy of the original mortgagee, obtain a sale of the bankrupt's interest in the original security (*r*); and if the original mortgagee purchases the equity of redemption, and the trustee rejects it, the sub-mortgagee may include it in his sale (*s*).

Order for sale of mortgaged leaseholds.

A lessee's covenant not to assign without the licence of the lessor does not affect the right to a sale; though this would be so if the lease were determinable on the committal of an act of bankruptcy (*t*). And on a sale the mortgagee will not be ordered to indemnify the trustee against the covenants, he having had the option of rejecting the lease (*u*).

Postponement of right to call in money does not affect right to sale.

A proviso in a mortgage deed that the mortgage money shall not be called in for a specified time, will not, in the event of

(*m*) *Exp. Bacon*, 2 D. & C. 181. See *Exp. Moore*, 2 D. & C. 7.

(*n*) *Exp. Hodgson*, 1 Gl. & J. 12; *Exp. Drake*, 1 M. D. & De G. 539; *Exp. Bacon*, 2 D. & C. 181; *Exp. Barnes*, 3 M. & A. 497.

(*o*) *Post*, p. 1136.

(*p*) *Exp. Francis*, 1 D. & C. 274; *Exp. Pedder*, 3 D. & C. 622.

(*q*) *Exp. Keightley*, 3 De G. & S. 583.

(*r*) *Exp. Mackay*, 1 M. D. & De G. 550; *Exp. Powell*, De G. 435.

(*s*) *Exp. Tufnell*, 4 D. & C. 29.

(*t*) *Exp. Sherman*, Buck, 452; *Exp. Drake*, 1 M. D. & De G. 539; *Exp. Baglehole*, 1 Rose, 432.

(*u*) *Exp. Fletcher*, 1 D. & C. 318.

the mortgagor's bankruptcy, whereby he becomes unable to keep down the interest, preclude the mortgagee from making an application for a sale (*x*).

Effect of fraud, &c.

No order for sale will be made at the instance of the mortgagee if the transaction is tainted by fraud or other impropriety (*y*). So, also, an order for sale cannot be made where a sale of the mortgaged property would prejudice the general realization of the bankrupt's estate (*z*).

Dispute as to title of mortgagee.

Where the validity of a security is in dispute, but only part of the mortgaged property is the subject of litigation, the Court may order sale of the other part without prejudice to the mortgagee's rights in respect of the part not ordered to be sold (*a*).

Mortgagee by deposit may apply.

A mortgagee by deposit of title deeds may obtain an order for sale under the Bankruptcy Rules (*b*), and a memorandum of deposit is not necessary to enable him to do so (*c*).

Refusal after lapse of time.

In the case of a mortgage by deposit without any memorandum or other evidence in writing, the Court refused to order a sale, the bankrupt being dead and twelve years having elapsed between the deposit and the application for the sale (*d*).

Refusal on ground of fraudulent preference.

An application by a depositee for a sale was dismissed with costs where the bankruptcy took place within so short a time after the deposit was made as to raise a presumption of fraudulent preference which was not rebutted by sufficient evidence of the *bona fides* of the transaction (*e*). And the Court always regards advances made under such circumstances with suspicion, and will, at the request of the trustee, direct an inquiry as to the circumstances under which the security was given (*f*). In such cases the Court, unless satisfied that the security was not made in contemplation of bankruptcy, may order the mortgagee to deliver up the goods to the trustee in the bankruptcy (*g*).

Inquiry as to bankrupt's interest and extent of security.

If a security is created by the deposit of mortgage securities, and there is any doubt as to the nature or amount of the bank-

(*x*) *Exp. Bignold*, 3 Deac. 151; *Seaton* v. *Twyford*, L. R. 11 Eq. 591.
(*y*) *Exp. Turner*, 9 Mod. 418; *Exp. Wake*, 2 Deac. 352.
(*z*) *Exp. Broadbent*, 4 D. & C. 3; *Exp. Attwood*, 2 M. & A. 24; *Exp. Sykes*, 13 Jur. 486, Bky.
(*a*) *Exp. Wace*, 2 M. D. & De G. 730.
(*b*) *Exp. Powell*, De G. 435.
(*c*) *Exp. Drake*, 1 M. D. & De G. 439.
(*d*) *Exp. Jones*, 3 M. & A. 152.
(*e*) *Exp. Morgan*, 1 M. D. & De G. 116.
(*f*) *Exp. Wake*, 2 Deac. 352; *Exp. Dewdney*, 4 D. & C. 181; *Exp. Clouten*, 3 M. D. & De G. 187.
(*g*) *Exp. Ainsworth*, 2 Deac. 563.

rupt's interest under the mortgage, this ought to be ascertained before a sale is directed (*h*). So, if the mortgagee insists that the deposit was made as a security for future advances, as well as for the debt then due, and the debtor, by affidavit, deny the fact, the Court will direct an inquiry in respect of what debt the deposit was made (*i*). If the deposit was made by the solicitor of the bankrupt, it must be shown that he had authority to make it (*k*).

Determination of validity of mortgagee's claim.

In questions respecting the existence of equitable mortgages, as by deposit of deeds and the like, the Court will not in future refer the question, but will itself decide the point (*l*). If the Court decide, in the first instance, on the validity of the claim of the mortgagee, the decision is conclusive in bankruptcy (*m*).

Effect of imperfect memorandum of deposit.

The right of the depositee to a sale is not affected by an imperfection either in the memorandum or in the deposit, provided the intention to complete the security be shown (*n*). Nor is it affected by an arrangement made subsequent to the security between a mortgagor and a third person, under which the latter acquires an interest in the mortgaged property (*o*).

If an equitable mortgagee take a legal mortgage with notice of the bankruptcy, and on that account void, his right to a sale under the equitable mortgage is only suspended, and revives when the legal security is declared to be inoperative (*p*).

What parties must be before Court.

The mortgagee who applies for a sale must bring before the Court all persons with whom deeds relating to the property have been deposited by the bankrupt (*q*).

Postponement of sale.

The Court will not, as a general rule, postpone the sale on the application of the trustee, without the mortgagee's consent, the right of the trustee being only to redeem the mortgagee (*r*).

Conduct of sale.

The trustee, unless it be otherwise ordered, shall have the conduct of the sale (*s*). But as a general rule, where the

(*h*) *Exp. Bignold*, 1 Deac. 515; *Exp. Mackay*, 1 M. D. & De G. 550.
(*i*) *Exp. Mountfort*, 14 Ves. 606; *Exp. Martin*, 4 D. & C. 457. And see *Shaw* v. *Foster*, L. R. 5 H. L. 321; affirming *McCreight* v. *Foster*, L. R. 5 Ch. 604.
(*k*) *Exp. Coleman*, 4 Deac. 242.
(*l*) *Exp. Smith*, 1 D. & C. 441.
(*m*) *Exp. Jennings*, 2 Swanst. 360.
(*n*) *Exp. Robinson*, 1 D. & C. 119; *Exp. Leathes*, 3 D. & C. 112.
(*o*) *Exp. Booth*, 2 D. & C. 59.
(*p*) *Exp. Harvey*, 3 Deac. 547.
(*q*) *Exp. Burt*, 1 M. D. & De G. 191; *Re Parker*, M. & Bli. 394.
(*r*) *Exp. Belcher*, 2 D. & C. 587.
(*s*) Rule 73, *ante*, p. 1131.

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security is insufficient the conduct will be given to the mortgagee (*t*). It makes no difference in this respect that the mortgage deed contains a power of sale (*u*). But if the creditor entitled to the security happens to be the trustee under the bankruptcy, or he and the trustee have the same solicitor, some independent solicitor ought to be employed to make the necessary inquiries as to the security, and to take the account, as well as to conduct the sale (*x*).

Although the trustee delays selling under an order obtained by the mortgagee for sale of the mortgaged premises, with liberty for him to bid, the Court will not give the mortgagee the conduct of the sale (*y*).

Reserve price.

A trustee having the conduct of the sale is not entitled to fix a reserve price except with the mortgagee's consent, or upon an undertaking to pay the mortgagee his principal, interest and costs (*z*).

Mortgagee may bid.

If the mortgagee desires to bid at any sale, he may do so, although the mortgage contains a power of sale, as it is for the advantage of the creditors that there should be as many bidders as possible (*a*).

Mortgagee also trustee cannot bid.

But if the mortgagee is also the trustee, the value of the property should be previously ascertained, and directions given for it not to be sold for less than a specified sum (*b*).

If the trustee himself become the purchaser, being also a mortgagee, the property will be ordered to be resold, subject to his claim as mortgagee, though the sale was sanctioned by a resolution of creditors (*c*). A sale to a relative of the trustee is also void (*d*).

If the property be bought in by the trustee, the mortgagee, by applying for a second sale, waives all claim against the trustee for any difference in the amount of biddings between the first and second sales (*e*).

(*t*) *Re Jordan*, 13 Q. B. D. 228.
(*u*) *Exp. Davis, Re Hagley*, 3 D. & C. 504; *Exp. Hodgson*, 1 Gl. & J. 12.
(*x*) *Exp. Cowdry*, 2 Gl. & J. 272; *Exp. Rolfe*, 1 D. & C. 77; *Exp. Greenwood*, 1 D. & C. 542; *Exp. Lees*, 2 D. & C. 360.
(*y*) *Exp. McGregor*, 4 De G. & S. 603.
(*z*) *Exp. Skinner*, 1 M. & A. 81; *Exp. Barnard*, 3 D. & C. 291.
(*a*) *Exp. Hodgson*, 1 Gl. & J. 12; *Exp. Davis, Re Hagley*, 3 D. & C. 504; *Exp. Bacon*, 2 D. & C. 181.
(*b*) *Exp. Young*, De G. 146; *Exp. Holyman*, 8 Jur. 156.
(*c*) *Re Wainwright*, 19 Ch. D. 140, 147.
(*d*) *Exp. Forder*, W. N. (1881) 117, C. A.; *Re Moore*, W. N. (1881) 151.
(*e*) *Exp. Baldock*, 2 D. & C. 60.

The Court cannot compel a second mortgagee who does not claim under the bankruptcy but rests on his security, to concur in a sale obtained by a prior mortgagee (*f*). Where there are several incumbrancers, the Court can only sell either with the concurrence of all or subject to the rights of those who refuse to concur (*g*).

Where a mortgagee purchased under an order of the Court, and his principal and interest, calculated up to the 24th of March, exceeded the purchase-money, it was held that he was entitled to be let into possession from the preceding Christmas (*h*).

Costs.

Whether the conduct of the sale is given to the trustee or to the mortgagee, the costs, charges, and expenses of the trustee properly incurred will be a first charge on the proceeds of sale (*i*).

On the other hand, if the trustee raise objections on frivolous or mistaken grounds, he will only have costs out of the general estate, or may be made to pay the costs which arise out of his improper opposition (*k*).

A mortgagee will generally be allowed the costs of his application out of the proceeds of sale (*l*). But it is a settled rule that an equitable mortgagee by deposit, unaccompanied by any memorandum or evidence in writing of the purpose of the deposit, will not be entitled to his costs out of the proceeds of sale, but must pay them personally (*m*). *Quære* whether this rule would now be recognized. The rule does not apply in the case of deposits of securities with bankers, it being the ordinary custom of their business to take deposits without memoranda (*n*).

If the same mortgagee takes a deposit of deeds relating to freeholds and leaseholds, or several deposits, with a memorandum accompanying only the deposit of one set of deeds, the costs will be apportioned (*o*).

A subsequent memorandum may entitle the mortgagee to his

(*f*) *Exp. Jackson*, 5 Ves. 357.
(*g*) *Exp. Wright*, 3 M. & A. 49; *Exp. Topham*, 1 Madd. 38; *Exp. Burt*, 1 M. D. & De G. 191.
(*h*) *Bates* v. *Bonnor*, 7 Sim. 427.
(*i*) *Re Jordan, Exp. Harrison*, 13 Q. B. D. 228; Rule 75, *sup.*
(*k*) *Exp. Horne*, 1 Madd. 622. See *Exp. Bate*, 1 M. & Chit. 58.
(*l*) *Exp. Brown*, 1 D. & C. 34; *Exp. Berkeley*, 2 M. & A. 54.
(*m*) *Exp. Brightens*, 1 Swanst. 3; *Exp. Trew*, 3 Madd. 372; *Exp.* ———, 2 Madd. 281. And see *Exp. Anderson*, 3 De G. & S. 600; *Exp. Barclay*, 5 De G. M. & G. 403.
(*n*) *Exp. Moss*, 3 De G. & S. 599.
(*o*) *Exp. Robinson*, 1 D. & C. 119; *Exp. Ford*, 3 M. D. & De G. 457; *Exp. Thorpe*, 3 M. & A. 441.

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costs, if it clearly indicates the purpose of the deposit (*p*), but not otherwise (*q*).

A mortgagee who has lost his memorandum must bear all costs occasioned by the loss (*r*).

Right to rents after order for sale.

The effect of an order for sale on the rights of the mortgagee during the interval between the date of the order and the completion of the sale is different according as the mortgage is legal or only equitable. A legal mortgagee may enter into possession at any time, and has a legal right to receive the rents of the mortgaged property, which he may enforce by requiring the tenants to pay the rents to him (*s*). An order for sale does not in any way affect this legal right, and if he neglect to enforce it by his own action the order will not entitle him to receive the rents (*t*), unless, indeed, the mortgagee refrains from giving notice to the tenants by arrangement with the trustee for their mutual convenience in dealing with the bankrupt's estate (*u*).

If the tenants, after notice by a legal mortgagee to pay their rents to him, pay them to the trustee, the latter will be entitled to retain them, but the mortgagee may recover from the tenants all rents so paid (*x*).

An equitable mortgagee, however, has no legal right to receive rents, and cannot entitle himself to do so by giving notice to tenants (*y*). In order to entitle himself to the rents, he must take out equitable execution, as by obtaining the appointment of a receiver (*z*). The effect of an order for sale in bankruptcy is equivalent to an order for a receiver; and accordingly, from the time when the Court takes the property into his own hands, the rent follows the title to the property, just as the appointment of a receiver would give the rents to the equitable mortgagee (*a*).

An equitable mortgagee who has received rents from tenants cannot be compelled to refund them to the trustee (*b*).

(*p*) *Exp. Reynolds*, 2 M. & A. 104.
(*q*) *Exp. Smith*, 1 M. D. & De G. 165.
(*r*) *Exp. Rogers, Re Gregory*, 3 M. D. & De G. 297.
(*s*) *Ante*, p. 821.
(*t*) *Pope* v. *Biggs*, 9 B. & Cr. 245; *Exp. Living, Re Tombs*, 2 M. & A. 223.
(*u*) *Exp. Barnes*, 3 M. & A. 497.
(*x*) *Exp. Wilson*, 2 V. & B. 252. See *Re Gordon*, 61 L. T. 30.
(*y*) *Exp. Burrell*, 3 M. & A. 440; *Exp. Scott*, 3 M. & A. 592; but see *Finck* v. *Tranter, inf.* And see *ante*, p. 823.
(*z*) *Ante*, p. 823.
(*a*) *Exp. Thorpe*, 3 M. & A. 441. See also *Exp. Penfold*, 4 De G. & S. 282; *Exp. Pollard*, 1 M. D. & De G. 270.
(*b*) *Sumpter* v. *Cooper*, 2 B. &

Growing crops.

Similarly, a legal mortgagee is not entitled to the growing crops unless he actually takes possession (*c*). And he cannot recover in respect of crops which, before he obtains possession, have been carried off by the mortgagor or his trustee (*d*). But where in a liquidation the mortgagee put a man in possession and applied to the trustee for the crops, the latter was restrained from cutting the growing crops (*e*).

The right, however, of an equitable mortgagee to growing crops on land in the mortgagor's occupation, just as his right to the rents of the land (*f*), attaches from the date of the order for sale (*g*).

Ad. 223; *Garry* v. *Sharratt*, 10 B. & Cr. 716; *Pope* v. *Biggs*, 9 B. & Cr. 245. See *Finck* v. *Tranter*, (1905) 1 K. B. 427.

(*c*) *Re Gordon*, 61 L. T. 299; *ante*, p. 691.

(*d*) *Exp. Temple*, 1 Gl. & J. 216; *Exp. National Mercantile Bank, Re Phillips*, 16 Ch. D. 104, C. A.

(*e*) *Bagnall* v. *Villar*, 12 Ch. D. 812. See *Re Gordon*, 61 L. T. 299.

(*f*) *Supra.*

(*g*) *Exp. Bignold*, 2 Gl. & J. 273. See *Exp. Alexander*, 2 Gl. & J. 275.

CHAPTER LII.

THE REMEDIES OF A MORTGAGEE IN ADMINISTRATION OF THE ESTATE OF A DECEASED MORTGAGOR.

Assignment of administration actions to Chancery Division.

i.—Creditor's Administration Action in Chancery Division.—By the Judicature Act, 1873 (*a*), s. 34, all causes and matters relating to the administration of the estates of deceased persons are assigned to the Chancery Division.

Jurisdiction of County Courts.

But the County Courts have jurisdiction where the estate does not exceed in value the sum of 500*l.* (*b*).

Mortgagee may bring administration action.

It is clear that a mortgagee may bring an action in the Chancery Division against the representatives of a deceased mortgagor for administration of the estate of the latter.

Commencement of action.

The action may be commenced either by writ or by originating summons under R. S. C., Ord. LV. r. 4. A writ is necessary if the debt is disputed (*d*), or if pleadings are desirable in order to state clearly the questions arising in the action.

If the plaintiff seeks to prove against the general assets for his debt or for the balance, after deducting the amount actually realized by his security, or the assessed value thereof, he formerly sued on behalf of himself and the other creditors (*e*). But it was sufficient, if it appeared from the statement of claim that he so sued (*f*); and leave to amend by making the suit on behalf of all the creditors might be given at the hearing (*g*).

Right of annuitant to bring action.

The grantee of an annuity specifically charged on realty may, after the death of the grantor, bring an action claiming payment of arrears of the annuity out of the estates charged, and if the annuity deed contains a covenant by the grantor for personal payment, he may claim, as specialty creditor, pay-

(*a*) 36 & 37 Vict. c. 66.
(*b*) 51 & 52 Vict. c. 43, s. 67.
(*d*) *Re Powers, Lindsell* v. *Phillips*, 39 Ch. D. 291, C. A.
(*e*) *Re Royle*, 5 Ch. D. 540. See now *Re James*, (1911) 2 Ch. 348.
(*f*) *Eyre* v. *Cox*, 24 W. R. 317; *Re Tottenham*, (1896) 1 Ch. 628.
(*g*) *Woods* v. *Sowerby*, 14 W. R. 9.

ment of the deficiency out of the general assets (*h*). An annuitant, whose annuity is not in arrear, is not entitled to take proceedings for administration (*i*); but, if an administration decree is obtained by some one else, the annuitant will be allowed to prove for the value of the future annuity in competition with the other creditors (*k*).

Conduct of action.

A creditor suing for himself and all other creditors may dismiss his action at his pleasure until judgment, but not afterwards (*l*). But he may dismiss his own action after judgment in another creditor's action (*m*). And a debenture holder suing on behalf of himself and all other debenture holders may discontinue further proceedings even after decree (*n*).

A defendant may also, before judgment, have the action dismissed on motion, on payment of the debt, with interest and costs (*o*), together with the costs of other defendants (*p*).

But the Court refused to stay proceedings in a case where it appeared that the interests of an infant defendant might be prejudiced (*q*).

Concurrent actions.

Where there are two administration actions, and judgment has been first obtained in the second action, the mortgagee who has first taken proceedings will generally have the conduct of the action (*r*).

Personal representatives are necessary parties to action.

The legal personal representatives of the deceased debtor are necessary parties to an administration action, and must have been duly constituted by having proved the will or obtained letters of administration (*s*); and a general order for administration cannot be made in the absence of such representatives (*t*). So, it was held that a creditor could not issue an

(*h*) *Booth* v. *Leycester*, 3 My. & Cr. 463.

(*i*) *Re Hargreaves, Dicks* v. *Hare*, 44 Ch. D. 236, C. A.

(*k*) *Re Beeman, Fowler* v. *James*, (1896) 1 Ch. 48.

(*l*) *Handford* v. *Storie*, 2 S. & St. 196; *Wood* v. *Westall*, Yo. 305.

(*m*) *Armstrong* v. *Storer*, 9 Beav. 277.

(*n*) *Re Alpha Co.*, (1903) 1 Ch. 203.

(*o*) *Manton* v. *Roe*, 14 Sim. 353; *Wainwright* v. *Sewell*, 11 W. R. 560. See *Damer* v. *Earl of Portarlington*, 2 Ph. 30.

(*p*) *Pemberton* v. *Topham*, 1 Beav. 316. But see *Holden* v. *Kynaston*, 2 Beav. 204, where the circumstances were special.

(*q*) *Clegg* v. *Clegg*, 17 L. R. Ir. 118.

(*r*) *Re Matthews' Estate, Matthews* v. *Matthews*, 34 L. T. 718; *Re Swire*, 21 Ch. D. 647; Dan. Ch. Pr. (7th ed.) 1668.

(*s*) *Penny* v. *Watts*, 2 Ph. 149; *Beardmore* v. *Gregory*, 2 H. & M. 491; *Cary* v. *Hills*, L. R. 15 Eq. 79; *Rowsell* v. *Morris*, L. R. 17 Eq. 20. And see Ord. LV. r. 5 b.

(*t*) *Groves* v. *Lane*, 16 Jur. 1061; *Dowdeswell* v. *Dowdeswell*, 9 Ch. D. 294, C. A.

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originating summons for administration until a legal personal representative had been duly constituted (*u*). And it seems that only the executors who have proved the will need be parties (*x*).

The general personal representative of a debtor sufficiently represents his estate for the purposes of an administration action (*y*); but not so a mere administrator *ad litem* (*z*).

Personal liability of executor.

The executor of a mortgagor, who distributes the assets without providing for the mortgage debt, is personally liable for any deficiency; but his liability is determined at the expiration of six years, and so, *à fortiori*, is that of an executor of an executor (*a*).

Order for sale in administration action.

A mortgagee, suing on behalf of himself and all other creditors in an administration action, may apply to have his security realized by sale under order of the Court, and to have any deficiency made good out of the general assets (*b*). It makes no difference in this respect that the security is merely equitable (*c*); and a sale may be directed on the application of a mortgagee in an administration action brought by another creditor (*d*).

Time allowed for redemption.

Where the Court orders a sale of the mortgaged property belonging to a deceased debtor, six months will generally be given to his representatives for redemption (*e*). But an immediate sale will be directed under special circumstances, as if such sale is shown to be clearly for the benefit of an infant (*f*).

Form of order for sale of realty.

According to the present practice, though the rule is to administer the personalty, and in case of deficiency to have recourse to the realty, a sale of the latter is frequently directed with the approbation of the judge (*g*). The Court has power, under R. S. C., Ord. LI. r. 1, to order an immediate sale of the

(*u*) *Re Leask, Richardson* v. *Leask*, W. N. (1891) 159; 65 L. T. 199.

(*x*) See Conveyancing Act, 1911, s. 12.

(*y*) *Re Youngs, Doggett* v. *Revett*, 30 Ch. D. 421, C. A.

(*z*) *Dowdeswell* v. *Dowdeswell*, 9 Ch. D. 294, C. A.

(*a*) *Re Gale, Blake* v. *Gale*, 22 Ch. D. 820; *Re Marsden, Bowden* v. *Leyland*, 26 Ch. D. 783; *Re Hyatt, Bowles* v. *Hyatt*, 38 Ch. D. 609.

(*b*) *Daniel* v. *Skipwith*, 2 Bro. C. C. 155; *Marshall* v. *McAravey*, 3 Dr. & War. 232.

(*c*) *Brocklehurst* v. *Jessop*, 7 Sim. 438.

(*d*) *Greenwood* v. *Taylor*, 1 R. & My. 185.

(*e*) *Bell* v. *Carter*, 17 Beav. 11.

(*f*) *Davis* v. *Dowding*, 2 Keen, 245.

(*g*) Seton (7th ed.), 1347 *et seq.*

realty if it is necessary or expedient for the purposes of the action (*h*).

Sale subject to mortgage.

Where in an administration action the first mortgagee does not consent to a sale, the sale will be made subject to his mortgage (*i*); and where a mortgagee's lien is claimed in an administration suit, but the mortgagee refuses a tender of the amount found due to him as not including interest, the sale is made subject to the lien, and the mortgagee will not be allowed to share in the general assets (*k*).

Assent of mortgagee to sale.

If the mortgagee consents to the sale of the property comprised in his mortgage free therefrom, he must produce and deposit in Court the title deeds necessary to complete the sale (*l*).

Delivery of deeds.

But if he does not consent to the sale, he cannot be ordered to deliver up the title deeds even where an order for sale has been made in an action in which he has leave to attend (*m*).

Right to interest.

If a mortgagee consents to the sale in an administration action of the mortgaged property free from his mortgage, he is only entitled to six months' interest from the date of such consent, and if the mortgage debt is paid off within that time, or otherwise, to interest till payment (*n*).

Sale to mortgagee.

In a case where the equity of redemption in a mortgaged estate escheated to the Crown on death of the mortgagor intestate, unmarried and illegitimate, and the estate was not worth the mortgage money, it was ordered, in the administration of assets, that the estate should be sold to the mortgagee on his agreeing to accept it in full discharge of his debt, with liberty to apply to the Crown for a grant of the fee simple (*o*).

Administration in bankruptcy.

Under the Bankruptcy Act, 1883, s. 125, and the Bankruptcy Act, 1890, s. 21, insolvent estates may be administered in bankruptcy.

No distinction in administration between

ii.—Proof by secured Creditors in Administration.—There being now no distinction in the administration of assets between

(*h*) *Re Robinson, Pickard* v. *Wheater*, 31 Ch. D. 247.

(*i*) *Langton* v. *Langton*, 7 De G. M. & G. 30; *Wickenden* v. *Rayson*, 6 De G. M. & G. 210. But see 44 & 45 Vict. c. 41, s. 5, *ante*, p. 655.

(*k*) *Hempstead* v. *Hempstead*, 4 Beav. 423.

(*l*) *Livsey* v. *Harding*, 1 Beav. 343.

(*m*) *Re Parkes*, 66 L. T. 151; *Armstrong* v. *Dickson*, (1911) 1 Ir. R. 435.

(*n*) *Day* v. *Day*, 31 Beav. 270; Seton (7th ed.), 1372.

(*o*) *Rogers* v. *Maule*, 1 Y. & C. C. C. 6.

debts by simple contract and specialty.

Rule where the estate is insolvent.

debts by simple contract and debts by specialty, a mortgagee will gain no advantage, as regards proof for his debt, or for the balance thereof, after realizing or assessing his security, by reason of a covenant for personal payment contained in his mortgage (*p*).

Before the Judicature Act, 1875 (*q*), in the administration of an estate of a deceased debtor, the fact of insolvency made no difference in the payment of debts, which were payable according to their legal, or equitable, priority; but in sect. 10 thereof the following provision is made:—

"In the administration by the Court of the assets of any person who may die after the commencement of this Act, and whose estate may prove to be insufficient for the payment in full of his debts and liabilities, and in the winding up of any company under the Companies Acts, 1862 and 1867, whose assets may prove to be insufficient for the payment of its debts and liabilities and the costs of winding up, the same rules shall prevail and be observed, as to the respective rights of secured and unsecured creditors, and as to debts and liabilities provable, and as to the valuation of annuities and future and contingent liabilities respectively, as may be in force for the time being under the law of bankruptcy, with respect to the estates of persons adjudged bankrupt; and all persons who in any such case would be entitled to prove for, and receive dividends out of the estate of any such deceased person, or out of the assets of any such company, may come in under the decree or order for the administration of such estate, or under the winding up of such company, and make such claims against the same as they may respectively be entitled to by virtue of this Act."

This section has been repealed so far as relates to the winding up of companies and replaced by sect. 207 of the Companies Act, 1908 (*r*).

The words "may prove to be insufficient" mean where there is sufficient reason to believe that the estate will prove insolvent (*s*).

This section affects the rights of secured creditors as amongst themselves, as well as the rights of secured creditors as between them and the unsecured creditors, by regulating the mode of proof by creditors, according as they are secured or

(*p*) Stat. 32 & 33 Vict. c. 46.
(*q*) 38 & 39 Vict. c. 77.
(*r*) *Post*, p. 1159.
(*s*) Per Jessel, M.R., in *Re Hopkins*, 18 Ch. D. 370, at p. 377, C. A. See *Re Whitaker*, (1904) 1 Ch. 299.

unsecured, in conformity with the rules of the bankruptcy law (*t*).

Mortgagee may realize security notwithstanding administration.

Where an insolvent estate is being administered in the Chancery Division, the effect of this section is to render applicable the provisions of sect. 9 of the Bankruptcy Act, 1883 (*u*), so that the institution of the proceedings does not affect the power of any "secured creditor" within the meaning of that Act to realize or otherwise deal with his security, and to prove for the balance after deducting the net amount realized (*x*).

Proof by sub-mortgagee.

A sub-mortgagee may prove against the estate of the mortgagor for the whole amount of the debt secured by the original mortgage, but so as not to receive more than twenty shillings in the pound in respect of principal, interest and costs of his own debt (*y*).

Time when mortgagee must elect.

The creditor must elect how he will deal with his security at the time when he sends in his claim under the decree, which is equivalent to proof of his debt in bankruptcy (*z*).

Proof after certificate.

A mortgagee may come in and prove after certificate in an administration in the Chancery Division, if there are assets still undistributed and if no injustice would be caused thereby. If the debt has not been adjudicated upon, the disallowance of it in the certificate is not a fatal objection (*a*). The fact that the creditor might during the administration have realized his security for a substantial sum is not in itself a sufficient reason for refusing to allow him to come and prove when his security turns out to be insufficient (*b*).

Unregistered bill of sale good in administration.

Sect. 10 is not intended to enlarge the assets to be administered, but only to vary the rights of the persons entitled to the assets; and therefore it does not apply the rules of bankruptcy so as to make an unregistered bill of sale void as against unsecured creditors of the insolvent estate of the deceased grantor (*c*).

(*t*) *Re Whitaker*, (1901) 1 Ch. 9, overruling *Re Maggi*, 20 Ch. D. 545. As to proof by secured creditors in bankruptcy, see *ante*, pp. 1127 *et seq.*

(*u*) 46 & 47 Vict. c. 52.

(*x*) *Re London, Windsor, &c. Hotels Co., Quartermaine's Case*, (1892) 1 Ch. 639.

(*y*) *Re Burrell, Burrell* v. *Smith*, L. R. 7 Eq. 399.

(*z*) Per Jessel, M.R., in *Re Hopkins, Williams* v. *Hopkins*, 18 Ch. D. at p. 378, C. A. See *Harrison* v. *Kirk*, *inf.*

(*a*) *Re McMurdo, Penfield* v. *McMurdo*, (1902) 2 Ch. 684, C. A.

(*b*) *Ibid. Harrison* v. *Kirk*, (1904) A. C. 1.

(*c*) *Re Count D'Epineuil, Tadman* v. *D'Epineuil*, 20 Ch. D. 217.

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No interest allowed after judgment.

A creditor on the insolvent estate, whose debt bears interest, is not entitled to prove for interest up to the day of payment, but only to the date of the judgment for administration, which is equivalent to a receiving order in bankruptcy (*d*).

Not more than five per cent. interest can generally be allowed in the administration of insolvent estates (*e*). But this section does not prevent a secured creditor who has realized or assessed his security from allocating such value in discharge of interest at a higher rate than five per cent. and proving for the principal or balance of principal due to him (*f*).

Effect of administration order in bankruptcy.

The effect of an administration order made by the Court of Bankruptcy is to vest the estate of the deceased debtor in the official receiver as trustee, and to render it distributable for the benefit of creditors in like manner as under an adjudication in bankruptcy (*g*).

The general result of the enactments above referred to is that if the estate of a deceased mortgagor is insolvent, the mortgagee will no longer be entitled, as under the former law, to prove for the whole of his debt; but, whether the administration is commenced and continued in the Chancery Division, or transferred to or originally commenced in the Court of Bankruptcy, he will be allowed to prove only for the amount remaining unsatisfied after deducting the amount actually realized by the sale, or the assessed value of the security according to the rules prevailing in bankruptcy.

Proof after foreclosure.

Although a mortgagee who has foreclosed cannot afterwards enforce his personal remedies against the mortgagor or his estate (*h*), yet a mortgagee, after foreclosure and an abortive attempt at sale, was admitted to prove in an administration suit upon giving up the property, but was not allowed the costs of foreclosure (*i*). But where a mortgagee of leaseholds was ousted by reason of breach of lessee's covenants by the mortgagor's executors, he was allowed to prove for the whole amount due to him for principal, interest and costs (*k*).

(*d*) *Re Summers*, 13 Ch. D. 136; *Re Talbott*, 39 Ch. D. 567; *Re Thomas Salt & Co.*, W. N. (1908) 63. But see *Re Savin*, L. R. 7 Ch. 760.

(*e*) See Bankruptcy Act, 1890, s. 23.

(*f*) *Re Fox and Jacobs*, (1894) 1 Q. B. 438; *Re Green*, W. N. (1904) 105.

(*g*) Bankruptcy Act, 1883, s. 125 (5), (6).

(*h*) *Lockhart* v. *Hardy*, 9 Beav. 349.

(*i*) *Haynes* v. *Haynes*, 3 Jur. N. S. 504.

(*k*) *Re Burrell*, *Burrell* v. *Smith*, L. R. 7 Eq. 399.

iii.—Costs.—The commencement of an administration action, either by a creditor other than the mortgagee, or by a person interested in the estate, does not interfere with the exercise of the mortgagee's remedies by foreclosure, or by exercise of his power of sale. A mortgagee, therefore, whether he be legal or equitable mortgagee, is entitled, on a sale under his power, to receive out of the proceeds of sale the whole amount due to him under his mortgage for principal, interest, and taxed costs, including costs of the sale, in priority to the costs of the administration action (*l*).

Mortgagee selling under power may retain whole debt out of proceeds, including costs of sale.

A mortgagee, after an administration suit, selling under his power and paying the sale moneys into Court, is entitled to an order for his debt and costs without account, unless the amount is disputed (*m*).

Payment of proceeds into Court.

But if a mortgagee, instead of foreclosing or selling under his power, institutes as plaintiff an action for the administration and sale of the deceased mortgagor's estate (*n*), or if he adopts such an action and claims the benefit of it (*o*), then, as he does not rest exclusively on his contract, but seeks something beyond it, the costs of the action are in that case considered as costs of administration, and must be paid in the first instance in priority to the mortgage debt if the estate proves deficient. But in a recent case, where a mortgagee claimed general administration in addition to ordinary mortgagee's relief, he was held to be entitled to the amount due on his mortgages, including the costs relating to the mortgage security and the administration costs, in priority to the costs of the legal personal representatives of the mortgagor (*p*).

Rule where mortgagee brings or adopts administration action.

It was formerly held that an equitable mortgagee might bring an action for administration and sale without losing his priority for costs, on the ground that, not being entitled to foreclosure, his only means of realizing the security was to apply to the Court for a sale (*q*); but, now that it is settled that foreclosure is a right incident to an equitable mortgage (*r*),

Right of equitable mortgagee to costs.

(*l*) *Armstrong* v. *Storer*, 14 Beav. 535. See *Blair* v. *Ormond*, 1 De G. & S. 428.

(*m*) *Bingham* v. *King*, 14 W. R. 414.

(*n*) *Re Spensley's Estate*, L. R. 15 Eq. 16. But see 2 D. J. & S. at p. 363; *Pinchard* v. *Fellows*, L. R. 17 Eq. 421; *Re Banks, inf.*

(*o*) *White* v. *Bishop of Peterborough*, 3 Swanst. 109; Jac. 402; *Armstrong* v. *Storer*, 14 Beav. 535.

(*p*) *Re Banks, Daws* v. *Banks*, 45 W. R. 206.

(*q*) *Tipping* v. *Power*, 1 Ha. 405. But see *Wade* v. *Ward*, 4 Drew. 602.

(*r*) *James* v. *James*, L. R. 16 Eq. 153.

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there appears to be no distinction between the rights of a legal and an equitable mortgagee instituting or adopting proceedings for administration in respect of the priority of the costs over his mortgage debt.

Where a mortgagee was also a simple contract creditor, and filed a bill for administration, he was held entitled to payment of his mortgage money out of the mortgaged estate before the payment of any part of the costs of the suit (*s*).

Where a mortgagee commences his foreclosure suit and gets paid in an administration suit, he is allowed to stay proceedings in his own suit, and receives the costs thereof (*t*).

Priority not lost by consent to sale.

If a mortgagee, whether legal (*u*) or equitable (*x*), and whether originally made a defendant or not, to an administration action commenced by another person, simply consents to a sale in the action of the mortgaged property, he does not thereby forfeit his right to payment of his principal, interest, and costs, including his costs of the sale, in priority to the costs of other parties to the action (*y*); except that, if he is a defendant and concurs, he is apparently regarded as to some extent adopting the action, and therefore will not be allowed any costs incurred by him as a party to the action until after payment of the plaintiff's costs of sale; but a defendant mortgagee will be allowed his costs of the action out of the general assets, if any (*z*).

Effect of misconduct of mortgagee.

If, however, a mortgagee-defendant increases the costs of the administration action by improper conduct, as by claiming a greater amount under his security than is found to be due to him on taking the accounts, the costs of all parties in the action may be ordered to be paid in priority to the mortgage debt (*a*).

Costs of failing to prove debt.

A creditor failing to prove his debt may be ordered to pay the costs occasioned by his claim (*b*). But a mortgagee who

(*s*) *Aldridge* v. *Westbrook*, 5 Beav. 188; *Walter* v. *Stanton*, 10 W. R. 570.

(*t*) *Brooksbank* v. *Higgingbottom*, 31 Beav. 35.

(*u*) *Carr* v. *Henderson*, 11 Beav. 415; *Cutfield* v. *Richards*, 26 Beav. 241; *Dighton* v. *Withers*, 31 Beav. 423; *Cook* v. *Hart*, L. R. 12 Eq. 459.

(*x*) *Barnes* v. *Racster*, 1 Y. & C. C. C. 401. See *Wild* v. *Lockhart*, 10 Beav. 320.

(*y*) *Chissum* v. *Dewes*, 5 Russ. 29; *Carr* v. *Henderson*, *sup.*; *Langton* v. *Langton*, 7 De G. M. & G. 30; *Parker* v. *Watkins*, 2 John. 133; *Hilliard* v. *Moriarty*, (1894) 1 Ir. R. 316.

(*z*) *Berry* v. *Hebblethwaite*, 4 K. & J. 80.

(*a*) *White* v. *Gudgeon*, 30 Beav. 545.

(*b*) *Hatch* v. *Searles*, 2 Sm. & G.

brings in his accounts in an administration action will not be deprived of his costs merely because he claims *bonâ fide* more than the Court holds him to be entitled to (*c*).

Costs of defendant-mortgagee.

Where an administration suit is instituted to which the mortgagee is a party, he will receive his costs in priority to the costs of proceedings directed to be taken by the receiver in the suit, he, the mortgagee, having taken no part in the proceedings (*d*).

Where administration had been taken out to the effects of a deceased mortgagor of an undivided share of a fund, for the purpose of a suit which had been instituted by a third party to obtain distribution of the fund, the costs occasioned by such administration were thrown upon the general fund, though the mortgagee claimed the whole produce of his share free from all the costs of the administration (*e*).

In a suit for the administration of the trusts of a settlement, the costs of the defendant-mortgagee and all other parties come out of the fund (*f*).

Costs of puisne mortgagee.

Where a decree was made in an administration suit, at the instance of the first mortgagee as plaintiff, for the sale of the mortgaged property, and a puisne mortgagee concurred in the conveyance to the purchaser, it was held that the latter was not entitled to his costs of conveyance until the first mortgagee had been paid in full (*g*).

Where a puisne mortgagee brought an action against other mortgagees and the trustees of a will for administration of the testator's estate, it was held that the plaintiff was entitled to the costs of the action, so far as the proceedings therein were proper and for the general benefit of all the mortgagees, out of the estate in priority to the prior mortgagees, but that he must add the rest of his costs to his security; also that the trustee's costs must be allowed and paid out of the estate as between solicitor and client (*h*).

147; *Yeomans* v. *Haynes*, 24 Beav. 127; *Colyer* v. *Colyer*, 10 W. R. 748; *Wright* v. *Larmath*, W. N. (1869) 36.

(*c*) *Re Watts*, *Smith* v. *Watts*, 22 Ch. D. 5, C. A. See (1891) 2 Ch. at 370.

(*d*) *Langton* v. *Langton*, 7 De G. M. & G. 30.

(*e*) *Cotton* v. *Penrose*, 18 L. J. Ch. 128.

(*f*) *Bryant* v. *Blackwell*, 15 Beav. 44.

(*g*) *Wonham* v. *Machin*, L. R. 10 Eq. 447.

(*h*) *Re Barne*, *Lee* v. *Barne*, 62 L. T. 922. See *Ford* v. *Earl of Chesterfield*, 21 Beav. 426; *Carrick* v. *Wigan Tramways*, W. N. (1893) 98. As to costs of second mortgagees and second debenture holders, see *Re Clayton Engineering Co.*, W. N. (1904) 28; 90 L. T. 283, *post*, p. 1213.

CHAPTER LIII.

THE REMEDIES OF DEBENTURE HOLDERS AND MORTGAGEES OF COMPANIES.

Remedies of mortgagees and debenture holders generally.

I.—Actions by Debenture Holders, &c. to enforce Securities before Winding-up.—A security, whether in the form of a mortgage or of a debenture, on the property of a company which is carrying on its business as a going concern, may, as a general rule, be enforced by the same remedies as one available in the case of a mortgage of the property of an individual. The mortgagee or debenture holder may accordingly either realize the property under his power of sale, if such power is incident to the security (*a*), or he may obtain the appointment of a receiver; or he may sue for principal and interest on the covenant; or he may (except as against a railway company or other company whose undertaking is of a public nature (*b*)) bring an action for foreclosure or sale of the property charged by his security (*c*). He is also entitled, upon the winding-up of the company, to rights of proving against the general assets, and other rights which will be hereafter considered.

Holder of debentures secured by trust deed.

Where a trust deed to secure debentures contained a proviso that if the company should make default in payment the trustees might, on the request of a majority of the debenture holders, sell the property charged, it was held that a single debenture holder could not compel the trustees to exercise their power of sale against the wishes of the majority (*d*).

Mortgagees, &c. cannot sue before default.

The secured creditor of a company not in liquidation, like any other mortgagee, cannot enforce his security, unless default

(*a*) The power of sale conferred on mortgagees by the Conv. Act, 1881, s. 19, does not apply to debenture holders. *Blaker* v. *Herts and Essex Waterworks Co.*, 41 Ch. D. 399.

(*b*) See *ante*, p. 1033.

(*c*) See as to enforcing securities against companies by appointment of a receiver, *ante*, pp. 966 *et seq.* And as to foreclosure or sale, see *ante*, pp. 1033 *et seq.*

(*d*) *Kempe* v. *Jones*, W. N. (1884)

has been made in payment of principal and interest. So, if a debenture contains a condition for payment of principal at a future date and of interest, and that principal and interest should be paid at a specified place, a half year's interest having fallen into arrear, it was held that no default had been made in payment of interest so as to entitle the debenture holder to enforce his security until demand had been made for payment at the specified place, though it appeared that the interest had been previously paid by cheques sent through the post (*e*).

Court may grant relief before default under special circumstances.

The Court has, however, in some cases, granted relief before default where it has been shown that the security was in jeopardy through the insolvency of the company (*f*), or that the company was dealing improperly with the property charged to the prejudice of the debenture holder (*g*), or where there was a probability that the property comprised in the debentures would have to be realized in the near future (*h*).

Plaintiff must sue on behalf of all debenture holders.

The writ in an action commenced by a debenture holder must be issued on behalf of himself and all other the holders of similar debentures of the company (*i*); but leave to amend may be given at the hearing (*k*). A plaintiff suing on behalf of debenture holders of a particular class should describe that class as accurately as possible (*l*).

A plaintiff suing on behalf of himself and all other debenture holders is *dominus litis*, and may discontinue proceedings even after judgment (*m*).

Parties.

The defendants, when there is no trust deed, will be the company, and if there are several classes of debentures, holders of a debenture of each class, as representing other holders of that class. The fact that the judgment contains an inquiry as to other incumbrancers does not enable the plaintiff to dispense with subsequent incumbrancers as parties (*n*).

The holders of debentures which constitute a floating charge, subject to a specific mortgage, are necessary parties to a fore-

(*e*) *Thorn* v. *City Rice Mills*, 40 Ch. D. 357.

(*f*) *McMahon* v. *North Kent Ironworks Co.*, (1891) 2 Ch. 148; *Thorn* v. *Nine Reefs*, 67 L. T. 93; *Edwards* v. *Standard Rolling Stock Syndicate*, (1893) 1 Ch. 574.

(*g*) *Hubbuck* v. *Helms*, 56 L. J. Ch. 536.

(*h*) *Re Victoria Steamboats*, (1897) 1 Ch. 158.

(*i*) *Bowen* v. *Brecon Rail. Co.*, L. R. 3 Eq. 541.

(*k*) *Reese River Silver Mining Co.* v. *Attwell*, L. R. 7 Eq. 347.

(*l*) *Marshall* v. *South Staffordshire Tramways Co.*, (1895) 2 Ch. 36, C. A.

(*m*) *Re Alpha Co.*, (1903) 1 Ch. 203.

(*n*) *Re Wilcox & Co.*, W. N. (1903) 64.

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closure action by the mortgagee (*o*). A foreclosure order will not be made without the concurrence of all the debenture holders (*p*).

Absence of debenture holder.

When debentures constitute a charge on the property of the company by way of floating security, the Court will not make a foreclosure order in a debenture holder's action in the absence of any debenture holder (*q*).

Dissentient debenture holder to be made defendant.

If any debenture holder dissents from the plaintiff's claim, he is entitled to be made a defendant, either as representing the other dissentient debenture holders, if any there be, or alone if there be no other dissentients (*r*); or the plaintiff may make all the dissentient debenture holders defendants, or, if they are numerous, may apply by summons for an order under R. S. C. Ord. XVI. r. 9, that one of their number may be sued as representing the rest.

No appeal by person not named a party.

A debenture holder who is not a defendant cannot appeal from an order obtained by a plaintiff suing on behalf of all the debenture holders (*s*), for all who are represented by the plaintiff are bound by the order (*t*). The proper course is to apply to the Court below to be made a defendant, before appealing against the order (*u*).

Choice of plaintiff.

Debenture holders who determine to bring an action to enforce their securities should be careful in selecting a plaintiff to sue on their behalf; for if he is one against whom the company can assert a right by way of counterclaim, the action may be delayed (*x*); and if the plaintiff is personally precluded from suing, the action cannot proceed (*y*).

The indorsement on the writ will depend on the nature of the security. It will usually claim a declaration of charge, all necessary accounts and inquiries, payment, foreclosure or sale, and a receiver and, in some cases, manager (*z*).

Declaration of charge.

It is the usual practice to allow the judgment to contain a declaration that the debenture holders are entitled to a charge

(*o*) *Wallace* v. *Evershed*, (1899) 1 Ch. 891.

(*p*) *Re Continental Oxygen Co.*, (1897) 1 Ch. 511.

(*q*) *Re Continental Oxygen Co.*, *Elias* v. *Continental Oxygen Co.*, (1897) 1 Ch. 511.

(*r*) *Wilson* v. *Church*, 9 Ch. D. 552; *Fraser* v. *Cooper*, 21 Ch. D. 718.

(*s*) *Watson* v. *Cave* (No. 1), 17 Ch. D. 19, C. A.

(*t*) *Commissioners of Sewers* v. *Gellatly*, 3 Ch. D. 610.

(*u*) *Watson* v. *Cave* (No. 1), 17 Ch. D. 19.

(*x*) *Huggons* v. *Tweed*, 10 Ch. D. 359, C. A.

(*y*) *Burt* v. *British Nation Life Ass. Soc.*, 4 De G. & J. 158.

(*z*) For form of writ, see Dan. Forms, No. 1550.

on the assets of the company purporting to be charged by the debentures, even where the action is heard as a short cause; but the Court may refuse to make such a declaration, if it appears that there ought to be an inquiry into the validity of the debentures (*a*).

Originating summons for foreclosure.

Where the plaintiff is the registered holder of all the debentures of a series, he may bring an action for foreclosure, like an ordinary mortgagee (*b*), by originating summons (*c*).

Who may sue under trust deed.

Where debentures are secured by a covering trust deed, the trustees are the proper persons to bring an action to enforce the security, but if they refuse to do so, an action may be brought by a debenture holder suing on behalf of himself and all the other debenture holders, and making the trustees parties to his action (*d*). In the latter case the claim should be that the trusts of the deed may be carried into execution, and the trustees will be entitled to full costs (*e*).

Trustees represent their debenture holders.

If the trustees bring an action against the company, they will, as a general rule, sufficiently represent the holders secured by the trust deed for the purposes of the action (*f*). But if questions are likely to arise as to priorities between the holders of several series of debentures, the proper course is to make a debenture holder of each class a defendant as representing the holders of the same class (*g*).

Injunction against execution creditor.

A debenture holder, whose charge is specific, is entitled to an injunction against a judgment creditor who has issued execution against property charged by the debenture, although the time for the payment of the moneys secured thereby has not arrived (*h*).

Mortgagee of general assets not entitled to books of company.

A mortgagee of the general assets of a company is not entitled under his security to seize the books of the company; and, if he has done so, and the company is wound up, he must deliver them up to the liquidator (*i*).

(*a*) *Marwick* v. *Thurlow*, (1895) 1 Ch. 776. See also *Charlwood* v. *Leasehold Investment Co.*, W. N. (1895) 47; *Brinsley* v. *Lynton and Lynmouth Hotel, &c. Co.*, W. N. (1895) 53; *Parkinson* v. *Wainwright & Co.*, 64 L. J. Ch. 493.

(*b*) See *ante*, p. 1056.

(*c*) *Sadler* v. *Worley*, (1894) 2 Ch. 170.

(*d*) *Wood* v. *Williams*, 4 Madd. 186; *Troughton* v. *Binckes*, 6 Ves. 573.

(*e*) *Mortgage Ins. Corp.* v. *Canadian, &c.*, 70 L. J. Ch. 684.

(*f*) R. S. C., Ord. XVI. r. 8. See *Luke* v. *South Kensington Hotel*, 11 Ch. D. 121; *Mills* v. *Jennings*, 13 Ch. D. 639, C. A.

(*g*) *Griffith* v. *Pound*, 45 Ch. D. 553. See R. S. C., Ord. XVI. r. 9.

(*h*) *Legg* v. *Mathieson*, 2 Giff. 71; *Wildy* v. *Mid-Hants Rail. Co.*, 16 W. R. 409.

(*i*) *Re Clyne Tin Plate Co.*, 47

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By the Rules of the Supreme Court, Ord. LI., it is provided as follows:—

Power to make order for sale in debenture holders' action at any time.

R. 1B. "In debenture holders' actions, where the debenture holders are entitled to a charge by virtue of their debentures, or of a trust deed, or otherwise, and the plaintiff is suing on behalf of himself and other debenture holders, and where the judge in person is of opinion that there must eventually be a sale, he may in his discretion direct a sale before judgment, and also after judgment, before all the persons interested are ascertained, whether served or not."

The above provision does not apply where the plaintiff is not entitled to sue on behalf of the other debenture holders (*k*).

ii.—Petitions for Winding-up.—By sect. 129 of the Companies Act, 1908 (*l*), it is provided that a company under the Act may be wound up by the Court under the circumstances therein mentioned, and by sect. 268 of the same Act unregistered companies may be wound up under similar circumstances.

Petition by secured creditor.

A secured creditor does not by exercising his remedy to enforce his security by the appointment of a receiver deprive himself of his right to present a winding-up petition (*m*), and he does not by presenting such a petition elect to give up his security or in any way lose his right to it (*n*), and he is entitled to appear on the hearing of a winding-up petition without electing between resting on or giving up his security (*o*).

But when a mortgagee who has presented a winding-up petition gives notice of his intention to exercise his power of sale he may be restrained from so doing pending the hearing of the petition (*p*).

Right of creditor to winding-up order.

The petition of a creditor, secured or unsecured, stands on a different footing to one presented by a shareholder, inasmuch as a creditor, secured or otherwise, is, as a general rule, entitled

L. T. 439; *Engel* v. *South Met. Brewing Co.*, (1892) 1 Ch. 442.

(*k*) *Parkinson* v. *Wainwright*, 64 L. J. Ch. 493.

(*l*) 8 Edw. VII. c. 69.

(*m*) *Re Portsmouth Tramways Co.*; (1892) 2 Ch. 362.

(*n*) *Moor* v. *Anglo-Italian Bank*, 10 Ch. D. 681, 689; *Re Great Western Coal Consumers' Assoc.*, 21 Ch. D. 769. And see *Re Henry Pound, Son and Hutchins*, 42 Ch. D. 402, C. A.

(*o*) *Re Carmarthenshire Coal Co.*, 45 L. J. Ch. 200.

(*p*) *Re Cambrian Mining Co.*, W. N. (1881) 125; 29 W. R. 881.

to a winding up *ex debito justitiæ*. So that the Court has no discretion absolutely to refuse such an order, provided the creditor shows that the case comes within the Act (*q*). The Court will, however, dismiss the petition where it is proved that the company have no assets (*r*), or that the order would not benefit the creditors generally (*s*), or that no useful purpose would result from a winding-up (*t*).

Objections of dissentient creditors.

This rule, however, applies only as between the creditors and the company, and if a creditor presents a petition to wind up the company, the Court will pay attention to objections which may be made by dissentient creditors (*u*).

Petition by holder of debenture secured by trust deed.

A debenture holder is not entitled to petition for the winding up of a company where the payment of debentures is secured only by a trust deed whereby the covenant for payment of principal and interest is made with the trustees of that deed (*x*); but he will be entitled to do so if the debenture contains a covenant with the holder for payment to him (*y*).

When the Court may order the petition to stand over.

But though a creditor is generally entitled to a winding-up order as of right, the Court will order the petition to stand over where there is any prospect of payment (*z*). So where a mortgagee of a colliery presented a petition for winding up the mortgagor company, and it was shown that there was a reasonable prospect of payment of all claims if time was given, an immediate winding-up order was refused (*a*).

Disputed debt.

If there is no proof of the company being insolvent, and the alleged debt is *bonâ fide* in dispute, the creditor will be restrained from presenting a petition to wind up the company (*b*). And in such a case, if a petition has been presented,

(*q*) *Re London Suburban Bank*, L. R. 6 Ch. 641, 643; *Bowes* v. *Hope Soc.*, 11 H. L. C. 389, per Lord Cranworth.

(*r*) *Re Olathe Silver Mining Co.*, 27 Ch. D. 278; *Re International Commercial Co.*, 75 L. T. 639, C. A.

(*s*) *Re Greenwood & Co.*, (1900) 2 Q. B. 306.

(*t*) *Ibid.*; *Re London Health, &c.*, 76 L. T. 98; *Re Ilfracombe Bldg. Soc.*, (1901) 1 Ch. 111.

(*u*) See Companies Act, 1908, ss. 145, 201, 219. See also *Re Langley Mill Co.*, L. R. 12 Eq. 26; *Re West Hartlepool Co.*, L. R. 10 Ch. 618; *Re Chapel House Colliery Co.*, 24 Ch. D. 249, C. A.; *Re New York Exchange*, 39 Ch. D. 415, C. A.

(*x*) *Re Uruguay, &c. Rail. Co. of Monte Video*, 11 Ch. D. 372.

(*y*) *Re Olathe Silver Mining Co.*, 27 Ch. D. 278.

(*z*) *Re New York Exchange*, 39 Ch. D. 415.

(*a*) *Re Great Western Coal Co.*, 21 Ch. D. 769.

(*b*) *Cadiz Waterworks Co.* v. *Barnett*, L. R. 19 Eq. 182; *Cercle Restaurant Co.* v. *Lavery*, 18 Ch. D. 557; *New Travellers Chambers* v. *Cheese*, 70 L. T. 271.

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the Court has jurisdiction on motion to stay all proceedings under it or dismiss it (*c*).

Where the debt on which the petition is founded is disputed, the usual course is to order the petition to stand over, with leave to bring an action to establish the debt (*d*). But the Court is bound before doing so to see that the debt is disputed on some substantial ground (*e*).

iii. **Effect of Winding-up Proceedings on Rights of Action of Debenture Holders and Mortgagees of Companies.**—With regard to the enforcement by a creditor of a company of his remedies for the recovery of his debt, sects. 140, 265 and 270 of the Companies Act, 1908 (*f*), give to the Court in the interval between the presentation of the petition and an order upon it a discretionary power to restrain proceedings against the company and (as respects 265 and 270) against any contributory; while sects. 142, 266 and 271 peremptorily stay proceedings after an order has been made until leave of the Court has been obtained to proceed with them.

By sect. 211 any distress or execution against the property of the company after the commencement of the winding-up shall be void.

Leave to bring or proceed with action.

Sects. 142 and 211 must be read together; the latter section does not apply where leave has been given under the former (*g*). Leave may be given to proceed with the action to judgment, but the judgment cannot be put in force against the assets of the company without further leave (*h*).

Where a mortgagee has commenced an action against a company before the winding-up, he ought to obtain leave to proceed with his action except under special circumstances, or unless the same relief is given to him in the winding-up as he would obtain in the action (*i*).

Discretion of Court.

The Court has a judicial discretion as to granting or refusing leave to bring or proceed with an action against the company to

(*c*) *Re Gold Hill Mines*, 23 Ch. D. 210; *Re A Company*, (1894) 2 Ch. 349.

(*d*) *Re Catholic, &c. Publishing, &c. Co.*, 2 De G. J. & S. 116. See *Re Imperial Guardian, &c. Soc.*, L. R. 9 Eq. 447.

(*e*) *Re King's Cross Industrial Dwellings Co.*, L. R. 11 Eq. 149.

(*f*) 8 Edw. VII. c. 69.

(*g*) *Re Exhall Coal Co.*, 4 De G. J. & S. 377.

(*h*) *United English, &c. Co.*, L. R. 5 Eq. 300.

(*i*) *Re David Lloyd & Co.*, 6 Ch. D. 339, C. A.; *Strong* v. *Carlyle Press*, (1893) 1 Ch. 268, C. A.

enforce the security. So leave to institute a suit of foreclosure was refused where it appeared that the mortgagee could obtain full relief by an order in Chambers in the winding-up without the necessity for a suit (*k*).

Appeal.

When the judge has given leave to a plaintiff to proceed with a suit against a company, the Court of Appeal will not interfere with his discretion (*l*).

Costs of application.

As a general rule, if a creditor obtains leave to bring or continue an action against a company in liquidation, his costs of the application will be ordered to be paid out of the assets of the company (*m*). But if leave is refused, he will have to pay the costs (*n*), unless under special circumstances, as in a case where the Court was of opinion that the creditor had been hardly dealt with by the company (*o*).

If an action against a company is continued after a winding-up order without leave, the plaintiff would be liable to have his costs in the winding-up disallowed (*p*).

Realization of security by liquidator.

Sometimes, instead of giving the debenture holder or mortgagee leave to proceed, the liquidator is directed to realize the securities.

Effect of winding-up order on mortgagee's remedies.

The mere fact that an order has been made for winding up a company does not absolutely of itself prevent a mortgagee or debenture holder from bringing or maintaining an action to enforce his security, or confer on the liquidator the right to obtain an injunction to restrain such action, but, as a general rule, he will have leave to proceed with his action, unless under special circumstances, or it appears that he can obtain adequate relief in the winding-up (*q*). "The fact that a mortgagor is a company which has since been ordered to be wound up does not in any way affect the rights of the mortgagees" (*r*).

(*k*) *Re St. Cuthbert Lead Smelting Co.*, 35 Beav. 384. See also *Re A Company*, (1894) 2 Ch. 349, where the proceedings were an abuse of process.

(*l*) *Thames Plate Glass Co.* v. *Land and Sea Telegraph Co.*, L. R. 6 Ch. 643. See *Re Joshua Stubbs*, (1891) 1 Ch. 475; *Strong* v. *Carlyle Press*, (1893) 1 Ch. 268.

(*m*) *Re Trent and Humber, &c. Co.*, L. R. 8 Eq. 94; *Re Wenborn & Co.*, (1905) 1 Ch. 758.

(*n*) *Exp. Railway Steel and Plant Co.*, 8 Ch. D. 183; *Re Oak Pits Colliery Co.*, 21 Ch. D. 322, C. A.

(*o*) *Re Dimson's, &c. Co.*, L. R. 19 Eq. 202.

(*p*) *Re Hull Central Drapery*, 15 Ch. D. 326, C. A.

(*q*) *Re David Lloyd & Co.*, 6 Ch. D. 339, C. A.; *Re Longdendale Cotton, &c. Co.*, 8 Ch. D. 150.

(*r*) Per Lindley, L.J., in *Strong* v. *Carlyle Press*, (1893) 1 Ch. 268, at p. 274, C. A. See *Re Henry Pound, Son & Hutchins*, 42 Ch. D. 402; *Re Joshua Stubbs*, (1891) 1 Ch. 475.

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But the holder of a mere equitable charge on the "funds, assets, and effects" of a company was restrained from continuing an action for foreclosure after the commencement of winding-up proceedings (*s*).

Voluntary winding-up.

The jurisdiction of the Court to stay actions against a company in liquidation extends to cases where the company is being wound up voluntarily (*t*).

Mortgagee selling under power.

Where a company is in liquidation, a mortgagee or debenture holder should apply for leave before proceeding to realize his security under his power of sale. If he has himself filed a petition to wind up the company, he will not be allowed to sell till the order for winding-up (*u*).

Action against director or promoter.

But the Court has no jurisdiction to restrain a creditor of a joint stock company from suing the directors of a company, or an individual promoter who is liable for the debt, on the ground that an order has been made for winding up the company (*x*).

Action in foreign country.

Where a company is being wound up in this country, the Court may restrain a creditor from proceeding in the Courts of Ireland (*y*), Scotland (*z*), or in any foreign country (*a*). But a secured creditor will not be restrained from bringing or maintaining proceedings against the company in the Courts of another country if it appears that he could not enforce his security by proceeding in the winding-up (*b*).

Application *ex parte* to restrain action by creditor.

An application to restrain a creditor from commencing or proceeding with an action against the company ought not, generally, to be made *ex parte*. But in several cases actions by creditors against a company have been restrained on motion *ex parte*, until after the petition was disposed of, on the applicants giving the usual undertaking as to damages (*c*).

To whom application

The application must be made in that Division of the High

(*s*) *Jones* v. *Swansea Cambrian Benefit Building Soc.*, 50 L. J. Q. B. 428.

(*t*) *Re Keynsham Co.*, 33 Beav. 123; *Currie* v. *Consolidated Kent Collieries*, (1906) 1 K. B. 134.

(*u*) *Re Cambrian Mining Co.*, W. N. (1881) 125; 29 W. R. 881. See *Engel* v. *South Metropolitan Brewing, &c. Co.*, (1892) 1 Ch. 442.

(*x*) *Re Dover and Deal Rail. Co.*, 17 Sim. 11; *Re New Zealand Banking Co.*, 39 L. J. Ch. 128.

(*y*) *Re International Pulp Co.*, 3 Ch. D. 594.

(*z*) *Re Middlesboro' Firebrick Co.*, 52 L. T. 98; *Re Queensland, &c. Agency*, 58 L. T. 878; *Re Hermann Loog*, 36 Ch. D. 502.

(*a*) *Re North Carolina Estate Co.*, W. N. (1889) 53.

(*b*) *Re West Cumberland Iron and Steel Co.*, (1893) 1 Ch. 713. See *Norton* v. *Florence Land, &c. Co.*, 7 Ch. D. 332; *Moor* v. *Anglo-Italian Bank*, 10 Ch. D. 681.

(*c*) *Masbach* v. *Anderson & Co.*, 26 W. R. 100; *Everingham* v. *Co-operative Pure Family Beer Co.*, W. N. (1880) 99; *Re Artistic Colour Printing Co.*, 14 Ch. D. 502.

Court in which the action or proceeding which it is desired to restrain is pending (*d*).

should be made.

Where an injunction is granted on the application of a company in liquidation restraining an action or proceeding by a creditor, the general rule is, that the company pays its own costs of the application, and the creditor adds his costs thereof to his security (*e*).

Costs of application.

Transfer of action.

An action by a debenture holder or mortgagee to enforce his security, whether commenced before or after a company goes into liquidation, will be transferred, as a matter of course, to the judge exercising jurisdiction under the Companies Act, 1908 (*f*).

Rules as to proof in bankruptcy applicable to winding-up of insolvent companies.

iv.—Proof by Secured Creditors in a Winding-up.—Sect. 10 of the Judicature Act, 1875 (*g*), is repealed so far as it relates to the winding-up of companies by the Companies Act, 1908, and is reproduced or replaced by s. 207 of the latter Act, which provides that in the winding-up of an insolvent company the same rules shall prevail and be observed as to the respective rights of secured and unsecured creditors, and as to debts proveable, and as to the valuation of annuities and future and contingent liabilities respectively, as are in force for the time being under the law of bankruptcy with respect to the estates of persons adjudged bankrupt.

Proof in bankruptcy.

The rules regulating the rights of secured creditors to prove in bankruptcy have been already considered (*h*).

A judgment creditor of a company is not, by obtaining an order for a receiver in respect of his debt, constituted a secured creditor (*i*); but it is conceived that he would be if he registered the order under the Land Charges Act, 1900.

A secured creditor is entitled to prove in the winding-up for the whole amount that is due to him at the time of sending in his claim, and not merely for the balance after realizing or valuing his security (*k*).

(*d*) *Re Artistic Colour, &c. Co., sup.; Re General Service Co-operative Stores*, (1891) 1 Ch. 496.

(*e*) *Re Hill Pottery Co.*, L. R. 1 Eq. 649; *Re Plas-yn-Mhowys Coal Co.*, L. R. 4 Eq. 689.

(*f*) See Companies Winding-up Rules, 1909, r. 42.

(*g*) 38 & 39 Vict. c. 77, s. 10. See this section set out in full, *ante*, p. 1144.

(*h*) *Ante*, p. 1127.

(*i*) *Crowshaw* v. *Lyndhurst Ship Co.*, (1897) 2 Ch. 154.

(*k*) *Kellock's Case*, 3 Ch. 769; *Re London, Bombay, &c. Bank*, 9 Ch. 686; and see *Re Ligoniel Co.*, (1900) 1 Ir. R. 324.

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Effect of the section.

Section 207 only applies to cases where it is either proved, or there is sufficient reason to believe, that the estate of the company will turn out insufficient for the payment in full of its debts and liabilities, including the costs of winding-up (*l*). If there is reason to believe that a company in liquidation is insolvent, the section must be treated as applicable, until it is shown that the assets are sufficient for payment of the debts in full (*m*). The section, in effect, enacts that, on the winding-up of an insolvent company, such rules shall prevail as to the respective rights of the secured and unsecured creditors, and as to debts and liabilities proveable, and other matters, as may be enforced for the time being under the law of bankruptcy with respect to the estates of persons adjudged bankrupt (*n*).

Courses open to secured creditor in winding-up.

The secured creditor of a company in liquidation may, therefore, in accordance with the present rules in bankruptcy, either (1) rest on his security, giving up all claim to proof; (2) give up his security on the property of the company and prove for the whole debt; (3) realize his security and prove for any deficiency; or (4) assess its value and prove for the balance of the debt.

Delivery up of securities cannot be compelled till payment in full.

A secured creditor of a company in liquidation cannot be deprived of his security until he has been paid in full the principal, interest, and costs due thereon (*o*). So, where the principal was made repayable by instalments, which fell into arrear, it was held that the mortgagee was entitled, on the winding-up of the mortgagor company, to keep the mortgage as a security for the payment of future instalments, and to prove in the winding-up for instalments in arrear (*p*).

Election as to proof of debt.

A secured creditor, in deciding whether he will simply rest on his security, should bear in mind that he cannot maintain any action or proceeding to enforce his security without the leave of the Court (*q*); but he need not elect upon the course to be pursued until the certificate of debts is made (*r*).

Right to appear before election.

Secured creditors have a right to appear on the hearing of

(*l*) *Re Hopkins, Williams* v. *Hopkins*, 18 Ch. D. 370, 377.

(*m*) *Re Kellock's Case*, L. R. 3 Ch. 769. See *Re Ligoniel Co.*, (1900) 1 Ir. R. 324.

(*n*) Per Lindley, L.J., in *Mersey Steel and Iron Co.* v. *Naylor*, 9 Q. B. D. 648, at p. 668, C. A.

(*o*) *Warrant Finance Co.'s Case*, L. R. 10 Eq. 11.

(*p*) *Re Land Securities Co.* (No. 2), 44 W. R. 611, C. A.

(*q*) See *ante*, p. 1156.

(*r*) *Re Hopkins, Williams* v. *Hopkins*, 18 Ch. D. 370, 378. See *Carmarthen Coal, &c. Co.*, 45 L. J. Ch. 200.

a winding-up petition without having elected between their security and the assets (*s*).

Proof after dividend.

If a creditor of a company, believing himself to be fully secured, makes no claim for his debt in the winding-up, he may subsequently, on the security turning out defective, come in and prove for the unsecured balance of his debt on the terms of his disturbing no past dividend (*t*).

Amendment of proof.

On the other hand, where a creditor having a lien proves as an unsecured creditor, he will not be allowed as a matter of right to withdraw or amend his proof so as to claim his lien (*u*).

Realization of security by debenture holder.

Debenture holders may, immediately upon the commencement of the winding-up, proceed to realize their security though the time specified in the debentures for the repayment of the money borrowed has not arrived (*x*), and though no interest is in arrear (*y*).

Application of proceeds of security in discharge of interest since winding-up.

A secured creditor of a company which is in liquidation, who has realized his security in a foreclosure action without satisfying his debt, is not allowed to apply the proceeds of the security in payment, first, of interest subsequent to the winding-up, and then in reduction of principal, so as to increase the balance for which he claims to prove in the winding-up; he may, however, set off profits arising from the property since the winding-up order against interest accrued during the same period (*z*).

Fraudulent preference.

According to the rule laid down in bankruptcy, the doctrine of fraudulent preference can be enforced in the winding-up of a company only for the benefit of the creditors in general, and not for the benefit of a single debenture holder, or of one class of debenture holders (*a*).

Set-off.

Sect. 207 imports into the winding-up of a company the rules as to set-off in bankruptcy (*b*).

Extent of application of bankruptcy rules.

But this section is not a general enactment applying all the

(*s*) *Re Carmarthen Coal, &c. Co.*, 45 L. J. Ch. 200.

(*t*) *Re Kit Hill Tunnel, Exp. Williams*, 16 Ch. D. 590. See *Harrison* v. *Kirk*, (1904) A. C. 1.

(*u*) *Re Safety Explosives*, (1904) 1 Ch. 226.

(*x*) *Re Panama, &c. Royal Mail Co.*, L. R. 5 Ch. 318; *Hodson* v. *Tea Co.*, 14 Ch. D. 859.

(*y*) *Wallace* v. *Universal Automatic Machines Co.*, (1894) 2 Ch. 547.

(*z*) *Exp. Penfold*, 2 De G. & S. 282; *Re London, Windsor and Greenwich Hotels Co., Quartermaine's Case*, (1892) 1 Ch. 639. See as to allocation of proceeds to interest in cases of bankruptcy, *ante*, p. 1129.

(*a*) Companies Act, 1908, s. 210. See as to fraudulent preference in winding-up, *ante*, p. 617, where this section is set out.

(*b*) *Mersey Steel and Iron Co.* v. *Naylor, Benzon & Co.*, 9 App. Ca. 434; but see *Re Auriferous Properties*, (1898) 1 Ch. 691.

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rules of bankruptcy to a winding-up. It merely deals with certain special differences between the rules observed formerly in certain cases in the Courts of Chancery and Bankruptcy respectively, and enacts that in these cases the rules of bankruptcy shall prevail (*c*).

Reputed ownership.

The Bankruptcy Rules as to reputed ownership are not to be applied under sect. 207 in the winding-up of a limited company (*d*).

Nor does the section include the obligations of a company in liquidation under covenants in a lease to pay rent, no breach having taken place; and, accordingly, until breach, the mortgagee in possession of leaseholds is not entitled to have assets impounded to meet future rents (*e*).

Assessment of security.

Moreover, sect. 6 (2) of the Bankruptcy Act, 1883, requiring a secured creditor in his petition to state his security and its value, does not apply in the case of a petition to wind up a company (*f*).

Proof by creditor holding debentures as security.

It was held by Lord Romilly, M. R., that where a creditor holds debentures as collateral security for his debt, he cannot prove for the amount of the debentures, but only for the amount of his debt (*g*).

Proof in winding-up after contract for sale.

Where a mortgagee has contracted to sell the mortgage premises, he will, in a winding-up, be entitled to prove for his whole debt, less the amount of the purchase-money mentioned in the contract, without prejudice to the right to increase the proof in case the contract should go off, or to the right of further proof in respect of costs, charges, and expenses (*h*).

(*c*) *Re Coal Consumers' Assoc.*, 14 Ch. D. 625. See *Thomas* v. *Patent Lionite Co.*, 17 Ch. D. 250, C. A.

(*d*) *Re Crumlin Viaduct Works Co.*, L. R. 11 Eq. 755.

(*e*) *Re Westbourne Grove Drapery Co.*, 5 Ch. D. 248.

(*f*) *Moor* v. *Anglo-Italian Bank*, 10 Ch. D. 681.

(*g*) *Re Blakely Ordnance Co.*, L. R. 8 Eq. 244. See *Robinson* v. *Montgomery Brewery Co.*, (1896) 2 Ch. 841.

(*h*) *Re Oxford and Canterbury Hall Co.*, L. R. 5 Ch. 433.

CHAPTER LIV.

ACCOUNTS BETWEEN MORTGAGOR AND MORTGAGEE.

SECTION I.

ACCOUNTS BETWEEN MORTGAGEES AND MORTGAGORS GENERALLY.

Order for taking the accounts.

1.—Reference of Accounts to Chambers.—In all actions relating to mortgages brought either by the mortgagor or those claiming under him for redemption, or by the mortgagee for foreclosure, and whether the mortgagee has entered into possession of the mortgaged property or not (*a*), the usual order of the Court is that it be referred to Chambers to take an account of what is due to the mortgagee for principal, interest, and costs (*b*).

Extent of mortgagee's claim in accounts in foreclosure action.

The plaintiff in a foreclosure action is, as a general rule, entitled to claim in account only the principal and interest due on his security, and the costs of the action; he must show special grounds for claiming any other costs (*c*).

Special matters affecting accounts.

Any special matter affecting the state of account between the mortgagee and mortgagor in a foreclosure action, such as a claim by the mortgagor to redeem on payment of the amount at which the mortgagee had valued the security on the mortgagor's bankruptcy, should be pleaded or brought to the notice of the Court at the trial before the usual decree for foreclosure *nisi* is made, in order that directions may be given to the Master to have regard to such matter in taking the accounts, otherwise no such matter can be raised subsequently on taking the accounts (*d*).

The Court has jurisdiction to make an order for foreclosure in Chambers on a summons under Ord. XV. But it is doubtful

(*a*) As to accounts in the case of a mortgagee in possession, see *post*, pp. 1225 *et seq.*

(*b*) See *ante*, pp. 1060 *et seq.*

(*c*) *Bolingbroke* v. *Hinde*, 25 Ch. D. 795.

(*d*) *Sanguinetti* v. *Stuckey's Bank*, (1896) 1 Ch. 502.

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whether the usual order for accounts and inquiries, foreclosure or sale, can be made on a summons for directions. If, however, such an order is made on a summons for directions without objection it cannot afterwards be set aside solely on the ground of want of jurisdiction (*e*).

Preliminary accounts, &c.

If the Court orders preliminary accounts and inquiries to be taken before trial under Ord. XXXIII. r. 2, directions cannot be given which would have the effect of sending the whole action to be tried at Chambers (*f*).

Mortgagor's right of set-off.

ii.—**Set-off.**—In taking the accounts between a mortgagee and mortgagor, the latter may be given the benefit of any matters which he is entitled to set off against the amount claimed by the former (*g*).

But a mortgagee cannot set off a surplus against an unsecured debt due to him from the mortgagor (*h*).

Surety.

So, a surety who is being sued by the mortgagee may set off a debt which is due by the mortgagee to the principal debtor arising out of the transaction on which the liability arises (*i*).

Set-off in bankruptcy.

The right of set-off in bankruptcy has been extended under successive statutes by the mutual credit clauses.

Under sect. 38 of the Bankruptcy Act, 1883 (*k*), the date of the receiving order fixes the right of set-off, though the right may be stopped at an earlier date by notice of an act of bankruptcy (*l*). If there is no right of set-off at the time of the receiving order, subsequent dealings cannot create it (*m*); but it is immaterial that a liability existing at the date of the receiving order does not become an ascertained debt until afterwards (*n*).

Set-off of mortgage debt owing by bankrupt against claims for salary, &c.

Where a director of a company assigned his shares and salary to the company by way of security for debts owing by him to the company on his private account, and empowered the company to retain his salary and dividends, and sell his shares, but until an order directing otherwise the director was to be deemed to be the owner of the shares; the director having become bank-

(*e*) *Horton* v. *Bosson*, 80 L. T. 435, C. A.; *ante*, p. 1061.
(*f*) *Garnham* v. *Skipper*, 29 Ch. D. 566; 52 L. T. 239, C. A.
(*g*) *Dodd* v. *Lydall*, 1 Ha. 333. See *Bow, McLachlan & Co.* v. "*Camosun*," (1909) A. C. 597.
(*h*) *Re Gedney*, *post*, p. 1178.
(*i*) *Bechervaise* v. *Lewis*, L. R. 7 C. P. 372.
(*k*) 46 & 47 Vict. c. 52.
(*l*) *Re Daintrey*, *Exp. Mant*, (1900) 1 Q. B. 546, C. A.
(*m*) See *Re Milan Tramways Co.*, 25 Ch. D. 587, C. A.
(*n*) *Re Daintrey*, *sup.*

rupt, it was held that his shares passed as in the order and disposition of the bankrupt, but that the company was entitled to set off the bankrupt's debt as against the bankruptcy trustee's claim for dividends and salary (*o*).

Set-off in winding-up of companies.

The rules as to set-off which prevail in bankruptcy (*p*) are applicable to companies in liquidation only to such extent as is consistent with the special legislation in regard to companies (*q*). So a contributory cannot set off a judgment debt against calls (*r*).

Set-off of calls against debenture debt.

Where a shareholder holding debentures in a company deposited the debentures with his bankers by way of security, and subsequently calls were made on the shares; the bankers gave notice to the company of the equitable assignment of the debentures, which was entered on the register of debentures; the bankers then commenced a debenture holders' action against the company, and the company went into voluntary liquidation; it was held that the company were entitled to set off the calls made on the shares before the time of the winding-up against the sum due on the debentures, but not calls made in the winding-up (*s*).

Set-off of mortgage debt against moneys payable under policy of assurance.

Where the defendant in an action by a life assurance company to recover the amount due on a mortgage of policies effected by defendant with the company, paid the premiums, but did not receive the policy moneys upon the happening of the event upon which the same became payable; the company having gone into liquidation, it was held that the defendant was entitled to set off the sums payable under the policies against the amount due by him on the mortgage (*t*).

Further accounts.

iii.—**Further Accounts.**—If an account be taken in Chambers, and no further proceedings are had, and afterwards a second account is directed, it will be taken from the foot of the first account (*u*).

Receipt of moneys by mortgagee after certificate.

After the amount has been certified, the mortgagee should not receive any rents or other moneys on account of the estate. If the mortgagee, by such receipt before default, vary the

(*o*) *Nelson* v. *London Assurance Co.*, 2 S. & St. 292.
(*p*) 46 & 47 Vict. c. 52, s. 48.
(*q*) *Re Washington Diamond Mining Co.*, (1893) 3 Ch. 95, C. A.
(*r*) *Gill's Case*, 12 Ch. D. 755.
(*s*) *Christie* v. *Taunton & Co.*, (1893) 2 Ch. 175. See *Re Smith & Co.*, (1901) 1 Ir. R. 73.
(*t*) *Sovereign Life Assurance Co.* v. *Dodd*, (1892) 2 Q. B. 573, C. A.
(*u*) *Morris* v. *Islip*, 20 Beav. 654.

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amount certified, the account must be carried on, and a new day fixed for redemption (*x*).

Affidavit of subsequent receipts.

The mortgagee will not be allowed to avoid this by verifying the subsequent receipts, and paying over the amount (*y*); but he must account by affidavit for such subsequent receipts (*z*).

Receipt of moneys after default.

The receipt, however, of rent or other moneys by the mortgagee after default is made in payment on the day fixed for redemption, but before the affidavit of such default is made, does not make a further account necessary (*a*).

Where an order *nisi* for foreclosure had been made against a puisne mortgagee and the mortgagor with successive periods of redemption, and the mortgagee received rents after default of, but before final judgment against, the puisne mortgagee, and before the expiration of the period of redemption allowed to the mortgagor, it was ordered that the puisne mortgagee be foreclosed absolutely, and that a further account be taken against the mortgagor (*b*).

Account binding on subsequent incumbrancers.

iv.—Who are bound by the Accounts. An account is, generally speaking, only binding on parties to the action in which the account is taken (*c*). But an account taken in Chambers, between the mortgagor and first mortgagee, will be binding on subsequent incumbrancers (*d*), provided that the decree necessarily decides the rights between the co-defendants, as in the case of decrees of foreclosure, which provide for the claims of all parties.

Accounts, how far binding on co-defendants.

But accounts taken in a suit are not binding on co-defendants as between themselves unless the taking of such accounts as between co-defendants is necessary to the relief sought by the plaintiff; and, accordingly, in a suit before the Judicature Acts by a mortgagor against several incumbrancers for accounts and redemption, one of such defendants was not allowed to interrogate a co-defendant as to his claims (*e*).

(*x*) *Garlick* v. *Jackson*, 4 Beav. 154; *Alden* v. *Foster*, 5 Beav. 592; *Ellis* v. *Griffiths*, 7 Beav. 83; *Pears* v. *Coke*, L. R. 6 Ch. 645.

(*y*) *Buchanan* v. *Greenway*, 12 Beav. 355.

(*z*) *Constable* v. *Ellis*, 18 Beav. 593.

(*a*) *Constable* v. *Howick*, 5 Jur. N. S. 331; *National Permanent Bldg. Soc.* v. *Raper*, (1892) 1 Ch. 54.

(*b*) *Webster* v. *Patteson*, 25 Ch. D. 626.

(*c*) *Hall* v. *Heward*, 32 Ch. D. 430, C. A.

(*d*) *Needler* v. *Deeble*, 1 Ch. Ca. 299; *Williams* v. *Day*, 2 Ch. Ca. 32; *Sherman* v. *Cox*, 3 Rep. in Ch. 85; *Crisp* v. *Heath*, 7 Vin. Abr. 52.

(*e*) *Cottingham* v. *Earl of Shrewsbury*, 3 Ha. 627.

Counterclaim and third parties.

By the Judicature Act, 1873 (*f*), the Court is given a power to grant to a defendant any relief claimed by his pleadings, or relating to or connected with the original subject-matter of the cause as against any person whether a party or not, and such person, on service of notice of the claim, is to be deemed a party to the cause. But this power is discretionary (*g*), and will not be exercised so as to bring into a particular litigation other matters which could not, according to the settled practice of the Court, have been litigated therein (*h*).

Where questions exist between mortgagees and sub-mortgagees, co-defendants, the proper course under the present practice is to raise them by counterclaim delivered to the co-defendants (*i*).

Contribution for costs.

Where there is a decree for costs against co-defendants, one of them cannot, by an independent proceeding, obtain contribution against the other (*k*), but he can do so in the original action (*l*). A direction for contribution may be given between co-defendants (*m*).

Accounts binding on remainderman and others.

But an account stated between the mortgagee and tenant for life was apparently held to be binding on a contingent remainderman coming afterwards into *esse* (*n*); and an account stated between the mortgagee and the trustee of a bankrupt will be binding on all parties claiming under the bankrupt (*o*); and an account taken in a suit to which his ancestor was a party will be binding on the infant (*p*).

v.—Opening Accounts.—In every case an account, though "settled" or "stated," is liable to be opened for fraud, or the party impugning the account may be allowed, in case of specific error alleged or proved, to surcharge and falsify.

Grounds on which accounts will be opened.

Accounts may be opened on discovery of error even after certificate (*q*).

After certificate.

(*f*) 36 & 37 Vict. c. 66, s. 24 (3). See R. S. C., Ords. XVI., XIX.

(*g*) *Schneider* v. *Batt*, 8 Q. B. D. 701, C. A.

(*h*) *Re Scott, Padwick* v. *Scott*, 2 Ch. D. 736, at p. 742.

(*i*) *Shephard* v. *Beane*, 2 Ch. D. 223.

(*k*) *Dearsley* v. *Middlewick*, 18 Ch. D. 236.

(*l*) *Newry, &c.* v. *Macdonell*, (1903) 2 Ir. R. 454.

(*m*) Ord. XVI. r. 55; *Sawyer* v. *Sawyer*, 28 Ch. D. 595; *English, &c. Co.* v. *Flatau*, 36 W. R. 238; *Re Holt*, (1897) 2 Ch. 525.

(*n*) *Allen* v. *Papworth*, 1 Ves. Sen. 164, but see the note to that case. And see 2 Dr. & War. 205.

(*o*) *Knight* v. *Bampfield*, 1 Vern. 179.

(*p*) *Badham* v. *Odell*, 4 Bro. P. C. 349.

(*q*) *Re Browne, Exp. Sterling*, 19 L. R. Ir. 132, C. A.

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Fraud.

Fraud is a sufficient ground for opening a settled account (*r*), as, for instance, where gross overcharges are deliberately made (*s*). And where fraud and imposition are proved, an account may be opened many years after it has been closed, and even after the death of the person guilty of the fraud (*t*). A single fraudulent item is sufficient ground for opening an entire account (*u*).

Gross errors amounting to fraud.

It would seem, however, that it is not necessary to prove actual fraud if the errors proved in the account are sufficient in number and importance to show such gross negligence as constructively to amount to fraud (*x*).

Mutual mistake.

Under special circumstances a settled account may be re-opened upon the ground of mutual mistake. So where a mortgage account had been settled on the footing of compound interest, with half-yearly rests, both parties wrongly understanding that this was in accordance with the provisions of the mortgage deed, it was held that the account might be opened (*y*).

Fiduciary relation between parties.

If the mortgagee stands in a fiduciary relation to the mortgagor, *e.g.*, as trustee or solicitor, it is obvious that it is especially incumbent upon him to be careful that no errors appear in the accounts brought in by him: and in such a case a less amount of error will justify the Court in opening the account (*z*).

A client will be allowed to open all accounts against a solicitor-mortgagee on proof of errors in some, and although the settled accounts were agreed six years before the date of his claim (*a*).

Liberty to surcharge and falsify.

vi. **Surcharge and Falsification of Accounts.** As a general rule, unless fraud is proved, or unless the parties stand

(*r*) *Drew* v. *Power*, 1 Sch. & L. 192; *Chambers* v. *Goldwin*, 9 Ves. 254, 266.

(*s*) *Williamson* v. *Barbour*, 9 Ch. D. 529.

(*t*) *Roberts* v. *Kuffin*, 2 Atk. 113; *Vernon* v. *Vawdry*, 2 Atk. 119; *Wedderburn* v. *Wedderburn*, 4 My. & Cr. 41; *Allfrey* v. *Allfrey*, 1 Mac. & G. 87; *Williamson* v. *Barbour*, 9 Ch. D. 529.

(*u*) *Taylor* v. *Haylin*, 2 Bro. C. C. 310; *Pritt* v. *Clay*, 6 Beav. 503; *Allfrey* v. *Allfrey*, 1 Mac. & G. 87; *Coleman* v. *Mellersh*, 2 Mac. & G. 309. See *Gething* v. *Keighly*, 9 Ch. D. 547, at p. 550.

(*x*) *Clarke* v. *Tipping*, 9 Beav. 284; *Williamson* v. *Barbour*, *sup.* at p. 532; *Holgate* v. *Shutt*, 28 Ch. D. 111, C. A.

(*y*) *Daniell* v. *Sinclair*, 6 App. Ca. 181, P. C.

(*z*) *Williamson* v. *Barbour*, 9 Ch. D. 529, at p. 532. See *Lawless* v. *Mansfield*, 1 Dr. & War. 557; *Coleman* v. *Mellersh*, 2 Mac. & G. 309, at p. 314; *Re Webb*, *Lambert* v. *Still*, (1894) 1 Ch. 73, at p. 84.

(*a*) *Cheese* v. *Keen*, (1908) 1 Ch. 245.

in a fiduciary relation to each other, a settled account will not be opened for mere mistakes or omissions, but the party impugning the account will have liberty to surcharge or falsify (*b*).

Fiduciary relation.

Even where a fiduciary relation exists, unless actual fraud is proved, the Court will not readily open an account which has long been settled, but will make a decree that the objecting party may surcharge and falsify (*c*).

Illegal charges by solicitor.

If a solicitor, having taken a mortgage security, charges commission in his account on the amount of rents received, without informing his client that he has legally no right so to do, the mortgagor will be allowed to surcharge and falsify, notwithstanding his acquiescence in the charge (*d*).

By Ord. XXXIII. r. 5, it is provided as follows:—

Surcharge.

"Any party seeking to charge any accounting party beyond what he has by his account admitted to have received shall give notice thereof to the accounting party, stating, so far as he is able, the amount sought to be charged and the particulars thereof in a short and succinct manner."

Definition of "surcharge" and "falsify."

The expressions to "surcharge" and to "falsify" have been thus defined: "If any of the parties can show an omission, for which credit ought to be, that is a surcharge; or, if anything is inserted that is a wrong charge, he is at liberty to show it, and that is falsification" (*e*).

Errors in law.

Where a party is at liberty to surcharge and falsify, he is not merely confined to errors in fact, but may take advantage of errors in law (*f*).

Surcharge, &c. against mortgagee in possession.

The proper mode of proceeding for a mortgagor who makes claims against a mortgagee in possession on the ground of alleged wilful default, is to surcharge and falsify the accounts brought in by the mortgagee (*g*). So where a mortgagee in possession made in his accounts a charge for receiving the rents personally, liberty was given to the mortgagor to surcharge and falsify (*h*).

(*b*) *Re Webb, Lambert* v. *Still*, (1894) 1 Ch. 73, at p. 84, C. A. See *Vernon* v. *Vawdry*, 2 Atk. 119.

(*c*) *Millar* v. *Craig*, 6 Beav. 433; *Gething* v. *Keighly*, 9 Ch. D. 547; *Eyre* v. *Wynn-Mackenzie*, (1894) 1 Ch. 218; but see *Cheese* v. *Keen*, *sup.*

(*d*) *Langstaffe* v. *Fenwick*, 10 Ves. 405. And see *Wragg* v. *Denham*, 2 Y. & C. Ex. 117; *Mainland* v. *Upjohn*, 41 Ch. D. 126; *post*, p. 1173.

(*e*) *Pitt* v. *Cholmondeley*, 2 Ves. Sen. 565.

(*f*) *Roberts* v. *Kuffin*, 2 Atk. 112. See *Daniell* v. *Sinclair*, 6 App. Ca. 181.

(*g*) *Noyes* v. *Pollock*, 30 Ch. D. 336, at p. 342, C. A.

(*h*) *Langstaffe* v. *Fenwick*, 10 Ves. 404.

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Pleading fraud or error.

If a party seeks to open a settled account, or liberty to surcharge and falsify, he must in his pleadings specifically aver some direct and definite act of fraud or error, and support that averment with evidence (*i*). The charge may be set up by defence or counterclaim (*k*).

Evidence.

Where accounts were taken under a purchase by the mortgagee, reserving to the mortgagor a right of re-purchase within a limited period, the mortgagor remaining manager, books kept by the mortgagee were taken as *primâ facie* evidence of the amount of all moneys received and paid by him, with liberty to surcharge and falsify; but such books are not binding on the mortgagor (*l*).

Mortgage to solicitor for costs.

vii.—**Action to Open, &c. Accounts of Costs for which a Mortgage is given to a Solicitor.**—There appears no legal objection to a solicitor taking a mortgage security for his bill of costs actually due, pending the litigation; but if the security be taken for an unsettled account, an action for a general account will at any time lie against him (*m*); and although it is a rule that a settled account shall not be opened unless particular errors are pointed out, yet if, on an action brought by a client against his solicitor, alleging error generally in an account settled between them, the solicitor admit the fact, the account will be opened (*n*).

The omission to inform the client that he has a right to have the bill taxed is not of itself a ground for opening a settled account (*o*).

Taxation of costs after payment.

If a client has paid or given a mortgage for his solicitor's bill of costs without pressure or undue influence, and afterwards wishes to have it taxed, he must state and prove that the bill contains such grossly improper charges as furnish evidence of fraud (*p*).

(*i*) *Parkinson* v. *Hanbury*, L. R. 2 H. L. 1, at pp. 11, 19.

(*k*) *Eyre* v. *Hughes*, 2 Ch. D. 148.

(*l*) *Ogden* v. *Battams*, 1 Jur. N. S. 191; *The Swiftsure*, 82 L. T. 389.

(*m*) *Detillin* v. *Gale*, 7 Ves. 583. See *Williams* v. *Piggott*, Jac. 598; *Jones* v. *Tripp*, Jac. 322; *Pitcher* v. *Rigby*, 9 Pri. 79; *Hiles* v. *Moore*, 17 L. J. Ch. 385.

(*n*) *Matthews* v. *Wallwyn*, 4 Ves. 118. And see *Lawless* v. *Mansfield*, 1 Dr. & War. 557, 559; *Coleman* v. *Mellersh*, 2 Mac. & G. 309; *Blagrave* v. *Routh*, 8 De G. M. & G. 620; *Morgan* v. *Higgins*, 1 Giff. 270; *Dundonald* v. *Masterman*, L. R. 7 Eq. 518; *Eyre* v. *Hughes*, 2 Ch. D. 148; *Watson* v. *Rodwell*, 11 Ch. D. 150.

(*o*) *Re Webb*, *Lambert* v. *Still*, (1894) 1 Ch. 73.

(*p*) *Horlock* v. *Smith*, 2 My. & Cr. 495; *Re Lacey and Son*, 25 Ch. D. 301, C. A.

Opening settled account between solicitor and client.

When the security is given after a settlement of accounts, such accounts are subject to be opened even after the lapse of many years, the right to open such accounts not being limited to six years or any other definite period. So accounts stated and signed thirty years previous were opened generally, and not merely with leave to surcharge and falsify, when it appeared that the accounts contained improper charges, and that the client signed them without independent advice or proper explanation (*q*).

Surcharge, &c.

But if there have been only mistakes and omissions, there will be only liberty to surcharge and falsify (*r*); and if the amount due for costs or advances has never been fixed, or no bills have been delivered, the amount must be ascertained by taxation (*s*), notwithstanding the securities (*t*). The power to open accounts on action brought is not subject to the conditions affecting proceedings under the Solicitors Acts (*u*), but the principles on which a paid bill is opened are in both cases the same (*x*).

The rule as to mortgages for costs applies to legal and equitable securities equally (*y*).

Mortgage for costs not lightly disturbed.

If, however, the accounts have been properly investigated and settled, the mortgage will not be disturbed (*z*); and where the relation of solicitor and client has ceased for several years, and no fraud or special error is alleged, the accounts will not be opened, although no bills were delivered until after the date of the mortgage (*a*); and it will be no objection to the security, if *bonâ fide*, that it was obtained under pressure from the solicitor, and when money was wanted to meet the urgent necessities of the client (*b*).

Bankruptcy of client.

Where a client gives a mortgage to his solicitor for costs and covenants to pay the amount due on an account stated and then

(*q*) *Ward* v. *Sharp*, 50 L. T. 557; *Cheese* v. *Keen*, (1908) 1 Ch. 245.

(*r*) *Vernon* v. *Vawdry*, 2 Atk. 119; *Jones* v. *Moffett*, 3 J. & L. 636.

(*s*) *Harrison* v. *Wiltshire*, 2 Jur. 679; *Sandon* v. *Hooper*, 6 Beav. 246; *Cheese* v. *Keen*, *sup.*

(*t*) *Lawless* v. *Mansfield*, 1 Dr. & War. 557. See 1 Giff. at p. 288.

(*u*) 33 & 34 Vict. c. 28, s. 4; 44 & 45 Vict. c. 44, s. 8. See as to profit-costs, 58 & 59 Vict. c. 25; *Cheese* v. *Keen*, *sup.*

(*x*) Cordery (3rd ed.), p. 199.

(*y*) *Bristow* v. *Warner*, 10 Ir. Eq. R. 246; notwithstanding *Exp. Bovill*, 2 M. & A. 382, n. And see *Philby* v. *Hazle*, 29 L. J. C. P. 370.

(*z*) *Judd* v. *Ollard*, 5 Jur. N. S. 755; *Jones* v. *Roberts*, 9 Beav. 419; *Nelson* v. *Booth*, 5 W. R. 722.

(*a*) *Blagrave* v. *Routh*, 8 De G. M. & G. 621; but see *Lyddon* v. *Moss*, 4 De G. & J. 104.

(*b*) *Johnson* v. *Fesemeyer*, 3 De G. & J. 13; *Pearson* v. *Benson*, 28 Beav. 598; *Cheslyn* v. *Dalby*, 2 Y. & C. Ex. 170.

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becomes bankrupt, it is the duty of the trustee in bankruptcy to go behind the covenant and require evidence of the debt (*c*).

Costs where accounts not properly kept.

If no accounts have been kept, or there has been any misstatement on the part of the solicitor, or any overcharges in his unsettled account, he will be fixed with the costs (*d*).

Security for future costs.

A solicitor may take security from his client for future costs, whether contentious (*e*) or non-contentious (*f*). Such costs may now be ascertained by agreement in certain cases, and the mortgage deed itself, if properly explained, may amount to such an agreement.

Section II.

Accounts of Principal.

i.—General Right of Mortgagee to Payment of Principal.—A mortgagee will be allowed in account the principal sum originally advanced, or so much thereof as remains unpaid, unless the mortgagee has agreed to accept a less sum in satisfaction of his claim in respect of principal.

Acceptance of part payment in full if made by certain date.

Where a mortgagee agrees to take a portion of his debt in satisfaction of the whole upon payment on a fixed day, the Court will not relieve against the effect of non-payment on that day (*g*).

Bonus for loan not allowed.

ii.—Bonus or Commission for Loan.—Formerly it was a general rule that the mortgagee would not be allowed to increase the principal moneys secured by the mortgage by adding thereto a sum charged by way of bonus or commission in consideration of making the advance pursuant to stipulations made at the time of the advance, for such addition was thought to be a collateral advantage beyond principal, interest, and proper costs, and a clog on the equity of redemption (*h*). And

(*c*) *Re Van Laun, Exp. Chatterton*, (1907) 2 K. B. 23.
(*d*) *Davis* v. *Parry*, 1 Giff. 174; *Detillin* v. *Gale*, 7 Ves. 583.
(*e*) Sol. Act, 1870, s. 16.
(*f*) Sol. Rem. Act, 1881, Ord. VII.
(*g*) *Ford* v. *Earl of Chesterfield*, 19 Beav. 428; *Thompson* v. *Hudson*, L. R. 4 H. L. 1. See *Leeds and Hanley Theatre* v. *Broadbent*, (1898) 1 Ch. 343.
(*h*) *Broad* v. *Selfe*, 9 Jur. N. S. 885; *James* v. *Kerr*, 40 Ch. D. 449. See *ante*, p. 18.

a settled account including and allowing a bonus was set aside (*i*).

There is, however, no absolute rule that a mortgagee cannot, at the time of entering into the mortgage transaction, enter into some other agreement by which he gets some advantage. He may stipulate for a collateral advantage at the time and as a term of the advance, provided the equity of redemption is not thereby fettered and the bargain is a fair and reasonable one (*k*). It seems clear, therefore, that a mortgagee will be entitled to "any bonus or anything in the nature of a bonus which has been properly stipulated for, and has become due" before redemption (*l*). Most of the older cases were decided on the ground that a bonus or commission tended to usury, but now that the usury laws are repealed there seems to be no objection to such a stipulation, provided it is fair and comes to an end on redemption (*m*).

Distinction where bonus actually deducted.

Where, therefore, the mortgagee, pursuant to an agreement proved to have been entered into by the parties, and as part payment of the mortgage contract, deliberately, without improper pressure, and perfectly understood by the mortgagor, actually deducted at the time of the advance a sum for commission or bonus out of the sum advanced, the Court directed that, in taking the account, the sums actually deducted for commission at the time of the advance should be allowed, but that all other sums charged for commission should be disallowed (*n*).

Agreement for payment of larger sum on falling in of mortgaged reversion.

Even though no sum is actually deducted at the time of the loan, it is competent for the parties to stipulate by the mortgage deed that the mortgage shall be redeemable only on payment at a future time, or on the happening of a given event, of a much larger sum than that originally advanced, even though interest is made payable in the meantime; and it may also be stipulated that if a smaller sum is paid at an earlier date, or

(*i*) *Barrett* v. *Hartley*, L. R. 2 Eq. 789.

(*k*) *Biggs* v. *Hoddinott*, (1898) 2 Ch. 307, C. A.

(*l*) See *Bradley* v. *Carritt*, (1903) A. C. 253, per Lord Davey.

(*m*) See *Noakes* v. *Rice*, (1902) A. C. 24, 33; *Bradley* v. *Carritt*, *sup.*; and see *Browne* v. *Ryan*, (1901) 2 Ir. R. 653.

(*n*) *Mainland* v. *Upjohn*, 41 Ch. D. 126. See also *Potter* v. *Edwards*, 32 L. J. Ch. 648; *Bucknell* v. *Vickery*, 64 L. T. 701; *Eyre* v. *Winn-Mackenzie*, (1894) 1 Ch. 218, 227, appealed on another point, (1896) 1 Ch. 135, C. A.

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before the event happens, the mortgagee shall accept it in satisfaction of the larger sum (*o*).

Exception of unconscionable dealing with expectant heir.

An exception is, however, made in this respect in the case of a mortgage by an expectant heir of a reversionary interest, where undue advantage is taken by the mortgagee of the necessities of the mortgagor, in which case the mortgagee will be allowed only the sum actually advanced with simple interest at five per cent. per annum (*p*).

Commission on instalments not duly repaid.

Where a mortgage debt was made repayable at specified dates by instalments, and it was agreed that, if default was made in payment of any instalment, "a commission" of 1*l*. per cent. should be paid for every month from the date at which such instalment became payable till actual payment thereof: it was held, in a foreclosure action, that this commission was not a contract to pay a higher rate of interest (*q*), nor of the nature of a penalty, and that the mortgagee was entitled to charge for it on taking the account (*r*). So a mortgagee of a ship may contract for a commission on any cash advance remaining unpaid for two months (*s*).

Form of claim for bonus.

Where a mortgagee is entitled to bonus or commission for a loan, he may claim it either in taking the account of what is due on the mortgage, or under the head of "just allowances" (*t*).

iii.—Further Advances.—The next question to be considered is how far a mortgagee will be allowed to charge in account further advances made by him to the mortgagor as against the mortgagor himself and those claiming under him, other than subsequent incumbrancers and assignees for value of the equity of redemption (*u*).

Right of mortgagees to charge in account further advances made on credit of the land.

It is a settled rule of equity that a mortgagee, whether his security is legal or equitable, shall not be deprived thereof without payment of all sums of money due to him from the mortgagor which form a general or specific lien on the land; and therefore if the mortgagee advance other sums of money

(*o*) *Webster* v. *Cook*, L. R. 2 Ch. 542.

(*p*) *Beynon* v. *Cook*, L. R. 10 Ch. 389. See further, as to dealings with expectant heirs, *ante*, p. 632.

(*q*) See *ante*, p. 138.

(*r*) *General Credit and Discount Co.* v. *Glegg*, 22 Ch. D. 548.

(*s*) *The Benwell Tower*, 72 L. T. 664.

(*t*) *Bucknell* v. *Vickery*, 64 L. T. 701, P. C.

(*u*) As to the right of a mortgagee having the legal estate to tack further advances as against puisne incumbrancers and assignees of the equity of redemption, see *post*, pp. 1257 *et seq.*

to the mortgagor expressly by way of further charge, thereby creating a specific lien, or on a judgment whereby an actual charge is created, or on statute, thereby creating a general lien, neither the mortgagor nor, generally speaking, anyone claiming under him, though for valuable consideration and without notice, is allowed to redeem without payment to the full amount advanced (*x*).

Principle of this doctrine.

The general principle governing the question as to when a mortgagee will be allowed to charge further advances in account appears to be that such advances must have been made on the faith of an actual charge on the land, and not on merely personal security.

Presumption that further advance by mortgagee is made on credit of the land.

In the case of an original advance, the fact that it was made on the credit of the land can only appear from the nature of the security taken at the time, for there is no antecedent transaction from which any presumption of intention to charge the land can be raised; but in the case of a further advance by a lender who has already either a legal mortgage or an equitable charge on the land, it is reasonably to be presumed that the further advance is made on the credit of the land over which the lender has already a hold in respect of the original transaction, provided a security of some sort is taken which, though not an actual charge on the land, may ripen into such a charge.

Further advance on equitable charge.

Further advances can accordingly be charged in account and added to the principal sum secured by the mortgage, if such advances are made on the security of an equitable mortgage of the same lands by deed in the ordinary form (*y*).

Informal agreement for charge.

A mortgagee can also charge in account, as against the mortgagor or his heir or devisee, all further advances made on the security of an agreement in writing, however informal, whereby an equitable charge on the land is created (*z*).

Deposit of deeds.

So also a mortgagee was allowed to charge in account further advances made on the security of a deposit of deeds (*a*).

Further advance on invalid security.

But a further advance cannot be allowed in account if made on the security of a charge which proves to be invalid, or if made on the security of a verbal agreement for the deposit of

(*x*) Story's Eq. Juris. Vol. I. p. 334. See *Cairncross* v. *Bradley*, 2 Dr. & Wal. 482.

(*y*) *Goddard* v. *Complin*, 1 Ch. Ca. 119.

(*z*) *Hibernian Bank* v. *Gilbert*, 23 L. R. Ir. 321. As to what informal instruments will create an equitable charge on land, see *ante*, pp. 62 *et seq.*

(*a*) *Cooke* v. *Wilton*, 29 Beav. 100.

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a lease when granted, as it does not constitute an equitable mortgage (*b*), or of a verbal agreement for a security on future rent, though coupled with a written order on the tenant to pay it to the lender, without stating the consideration, as it is void under the Statute of Frauds (*c*).

Further advance secured by judgment.

It will be seen that a judgment does not now create an actual charge on land until registration of the writ or order enforcing it (*d*). It is quite clear that a mortgagee may charge in account, as against the mortgagor and those claiming under him by descent or demise, and may even tack as against puisne incumbrancers and assignees of the equity of redemption, of whose claims he has no notice (*e*), moneys owing to him on the security of a subsequent judgment which forms an actual charge on the land (*f*).

It is submitted that a mortgagee is still entitled to charge in account a subsequent judgment under the present bankruptcy law, notwithstanding the bankruptcy of the judgment debtor; and this, of course, if execution had issued prior to the date of the receiving order, and without notice of an act of bankruptcy (*g*).

Judgment must have issued before original mortgage debt is paid off.

In order to entitle a mortgagee to add to the original debt a sum secured by a judgment, the judgment must have been taken before redemption of the mortgage. So, where land was mortgaged to secure a certain sum, and a further sum was due to the mortgagee on the personal covenant of the mortgagor; the mortgagee brought an action to recover both sums, and the mortgagor paid the mortgage debt only into Court; the mortgagee took this sum out of Court, and he proceeded in the action and recovered judgment on the covenant; it was held that, the mortgage having been discharged by the payment out of Court, the mortgagee was not entitled to add the judgment debt to his security (*h*).

Moneys paid by mortgagee as surety to

Where a mortgage of a fund in Court was given to secure a debt by a person who was largely indebted to the Crown, it was

(*b*) *Exp. Coombe*, 4 Madd. 249.
(*c*) *Exp. Hall*, 10 Ch. D. 615, C. A.
(*d*) See *post*, Chap. LIX.
(*e*) See as to this, *post*, pp. 1256 *et seq.*
(*f*) *Brace* v. *Duchess of Marlborough*, 2 P. Wms. 491, 493; *Anon.*, 2 Ves. Sen. 662; *Exp. Knott*, 11 Ves. 609, 617.
(*g*) See *Baker* v. *Harris*, 16 Ves. 397; *Exp. Boyle*, 3 De G. M. & G. 515. See Bankruptcy Act, 1869, ss. 12 and 40; *ibid.* 1883, s. 9.
(*h*) *Mayor of Brecon* v. *Seymour*, 26 Beav. 548. See *Re Gregson*, 36 Ch. D. 223.

held that the sums paid by the executor of the mortgagee, who was surety to the Crown for the mortgagor, ought to be treated as further advances and added to the mortgage security (*i*).

Crown treated as further advances.

A mortgage to cover advances to the mortgagor and his assigns will cover advances to a tenant for life under the mortgagor's will (*k*).

A mortgage to secure a balance of accounts not to exceed a certain sum does not include further advances (*l*).

Where a mortgage is construed as a running security, the mortgagor can only be charged to the extent of his own admissions, unless the mortgagee proves a larger amount to have been advanced (*m*).

Interest.

It is elsewhere noticed that interest cannot be converted into principal as against a *puisne* incumbrance of which the first mortgagee has notice (*n*).

Costs.

Costs, charges, and expenses which properly fall within the security are not treated as "further advances," but will be added to the security, even against puisne incumbrancers (*o*).

Further advances on personal security.

The general rule that a mortgagee may charge further advances does not apply in account if the further advance was not made on the security of the land so as to create a lien thereon, either specifically or generally (*p*); and, therefore, as copyholds were not, prior to the stat. 1 & 2 Vict. c. 110, liable at law to an extent, a judgment debt could not have been added to a mortgage of copyhold land (*q*).

Bond debt cannot be added against mortgagor.

iv.—Bond Debts.—Notwithstanding some difference of opinion in early cases, it is now settled that the mortgagee cannot charge in account against the mortgagor sums secured by bond or other specialty (*r*).

It makes no difference in the right of the mortgagee in this respect, whether the bond debt is prior or subsequent to the

(*i*) *Foster* v. *Hargreaves*, 1 Keen, 281.
(*k*) *Re Watts*, 22 Ch. D. 1, C. A.
(*l*) *Re Meadows*, 5 Jur. N. S. 421.
(*m*) *Melland* v. *Gray*, 2 Y. & C. C. C. 199.
(*n*) *Post*, p. 1192.
(*o*) *Post*, p. 1198.
(*p*) *Exp. Knott*, 11 Ves. 617; *Lacey* v. *Ingle*, 2 Ph. 413.
(*q*) *Heir of Cannon* v. *Pack*, 6 Vin. Abr. 222, pl. vi. See Coke's Copyholds, s. 21, pl. 103.
(*r*) *Morret* v. *Paske*, 2 Atk. 53; *Lowthian* v. *Hasel*, 3 Bro. C. C. 162; *Archer* v. *Snatt*, 2 Stra. 1107; *Jones* v. *Smith*, 2 Ves. Jun. 376. In *Sharpnell* v. *Blake*, 2 Eq. Ca. Abr. 603, the word "can" must be a misprint for "cannot."

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mortgage (*s*), or whether the mortgage be made to the bond creditor originally, or taken by assignment (*t*).

So a mortgagee who realises his security cannot set off a surplus in his hands against a bond debt owing to him from the mortgagor (*u*).

Right to add bond debt against heir or devisee.

As, however, the heir or beneficial devisee became liable to discharge the bond, it might be added to the mortgage as against them merely in order to avoid circuity of action (*x*). Where, therefore, the mortgagee made a further advance on a bond binding the heir, the heir (*y*), or beneficial devisee (*z*), could not redeem without paying off the bond as well as the mortgage (*a*).

Exception where lands are charged with payment of debts.

This does not, however, apply where the mortgagor's real estate is, by his will, charged with or devised subject to his debts. Thus, if the devise be for payment of debts generally, the mortgagee must, as to his bond debt, come in rateably with the other creditors (*b*). So, also, it was held that a mortgagee who lent a further sum upon a bond was not entitled to add it to his mortgage in preference to creditors under a trust created by the will of the mortgagor for payment of debts (*c*); and the result is the same, whether there be an express trust or only a charge for the payment of debts (*d*).

Creditors.

It is well settled that a debt secured by bond cannot be added to a mortgage debt as against creditors, whether secured or unsecured (*e*).

Assignees.

An assignee from the mortgagor may, of course, redeem without payment of the bond debt; this is distinctly laid down by Lord Somers, who says, "If the mortgagor mortgage his equity of redemption to another, the second mortgagee shall not be affected with the bond; for it is but a personal charge on the mortgagor" (*f*).

(*s*) *Windham* v. *Jennings*, 2 Rep. in Ch. 247.

(*t*) *Halliley* v. *Kirtland*, 2 Rep. in Ch. 360.

(*u*) *Re Gedney*, *post*, p. 1180. See *Gannon* v. *G.*, (1909) 1 Ir. R. 57.

(*x*) See *Heams* v. *Bance*, 3 Atk. 630; *Lowthian* v. *Hasel*, 3 Bro. C. C. 162.

(*y*) *Coleman* v. *Winch*, 1 P. Wms. 777; *Windham* v. *Jennings*, 2 Rep. in Ch. 228; *Elvy* v. *Norwood*, 5 De G. & S. 240; 16 Jur. 493.

(*z*) *Challis* v. *Casborn*, 1 Eq. Ca. Abr. 325, pl. 9. See *Du Vigier* v. *Lee*, 2 Ha. 326.

(*a*) See now Land Transfer Act, 1897.

(*b*) *Powis* v. *Corbet*, 3 Atk. 556; *Irby* v. *Irby*, 22 Beav. 217.

(*c*) *Heams* v. *Bance*, 3 Atk. 630.

(*d*) *Price* v. *Fastnedge*, Amb. 685.

(*e*) *Adams* v. *Claxton*, 6 Ves. 226; *Coleman* v. *Winch*, 1 P. Wms. 777; *Hamerton* v. *Rogers*, 1 Ves. Jun. 513. As to tacking bond debts against puisne incumbrancers, see *post*, p. 1260.

(*f*) *Anon.*, 3 Salk. 84. And see

The mortgagee cannot add a bond debt against the assignee of the heir (*g*), or of the beneficial devisee, or of the executor (*h*).

v.—Simple Contract Debts.—Notwithstanding certain authorities to the contrary, it was settled that a mortgagee could not, prior to the stat. 3 & 4 Will. IV. c. 104, have added or tacked to his mortgage debt a mere simple contract debt against a mortgagor, or his heir or devisee (*i*).

Former rule as to adding simple contract debts to mortgage.

This rule still holds good as regards the mortgagor (*k*). So, a beer account cannot be added or tacked as against puisne incumbrancers to a debt secured by a deposit of a brewer's lease (*l*).

Debt cannot be added against mortgagor.

The balance in hand after sale of the mortgaged premises cannot be retained after the death of the mortgagor against another debt due to the mortgagee, so as to give himself a preference over other creditors (*m*).

A mortgagee of a lease or other chattel interest may add to his mortgage debt a simple contract debt against the executor (*n*), but not against creditors (*o*).

Right as against executor of mortgagor.

Since 3 & 4 Will. IV. c. 104, a simple contract debt can be added to a mortgage debt against the heir or devisee redeeming, in cases in which there is not a devise for payment of debts. Thus, a mortgagee of copyhold may tack a simple contract against the heir or devisee, wherever the equity of redemption is assets in his hands for payment of simple contract debts, though the personal representative is absent (*p*).

Right as against heir or devisee.

Prior to the stat. 32 & 33 Vict. c. 46, this right against the heir or devisee could not be exercised to the prejudice of

No right as against creditors.

Anon., 2 Ves. Sen. 663; *Sharpnell* v. *Blake*, 2 Eq. Ca. Abr. 603.

(*g*) *Bayly* v. *Robson*, Prec. Ch. 89; *Coleman* v. *Winch*, 1 P. Wms. 775; *Troughton* v. *Troughton*, 1 Ves. Sen. 87; *Morret* v. *Paske*, 2 Atk. 53.

(*h*) *Coleman* v. *Winch*, *sup.*; *Vanderzee* v. *Willis*, 3 Bro. C. C. 20.

(*i*) *Newby* v. *Cooper*, Finch, 379; and see *Jones* v. *Smith*, 2 Ves. Jun. 378; *Exp. Hooper*, 19 Ves. 477.

(*k*) See (1902) 1 Ch. at p. 864.

(*l*) *Chilton* v. *Carrington*, 1 Jur. N. S. 89; *Dunn* v. *City of London Brewery Co.*, L. R. 8 Eq. 155; *Menzies* v. *Lightfoot*, L. R. 11 Eq. 459.

(*m*) *Talbot* v. *Frere*, 9 Ch. D. 568, 571, disapproving of *Spalding* v. *Thompson*, 26 Beav. 637. See *Re Haselfoot's Estate*, L. R. 13 Eq. 327; *Re General Provincial Assur. Co.*, *Exp. National Bank*, L. R. 14 Eq. 507; *Re Gedney*, *inf.*

(*n*) *Coleman* v. *Winch*, 1 P. Wms. 775; *Eccles* v. *Thawill*, Prec. Ch. 18; *Anon.*, 2 Vern. 177; *Rolfe* v. *Chester*, 20 Beav. 613.

(*o*) *Adams* v. *Claxton*, 6 Ves. 226.

(*p*) *Rolfe* v. *Chester*, 20 Beav. 610; *Thomas* v. *Thomas*, 22 Beav. 341.

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specialty creditors (*q*). Now that, by that statute, in the administration of assets of deceased persons, specialty and simple contract debts are treated as standing in equal degree, it is considered that the Act has not enlarged the right, and the mortgagee must, as regards his simple contract debt, come in rateably with the other creditors of the same degree (*r*).

Set-off by mortgagee.

Where a mortgagor devises the equity of redemption and dies insolvent, and between his death and an order for administration the mortgagee sells, he cannot set off any surplus in his hands against bond and simple contract debts owing to him from the mortgagor, the mortgagee being simply a trustee of the surplus for the mortgagor's devisees (*s*).

Section III.

Accounts of Interest.

Accruer of interest.

i.—Right of Mortgagee to Interest generally.—Interest on a mortgage, though fixed annually, accrues due from day to day (*t*).

Apportionment.

As between persons beneficially entitled in succession to interest under a mortgage, there must be an apportionment upon the determination of the particular interest, and a proportionate part must be paid to the owner of that interest or to his legal personal representatives, if dead (*u*).

As to annuitants.

Before the Apportionment Acts (*x*), an annuity was not generally apportionable; but now annuities are apportionable, except annuities which are payable in advance (*y*).

Mortgagee of life estate.

A mortgagee of a life interest is not an assign of the mortgagor within the meaning of the Act of Will. IV., so as to entitle him to receive an apportioned part of the rents of the estate (*z*).

(*q*) *Ibid.* See *Talbot* v. *Frere*, 9 Ch. D. 571.

(*r*) Will. Real Assets, 26; *Pile* v. *P.*, 23 W. R. 440.

(*s*) *Re Gedney*, (1908) 1 Ch. 804.

(*t*) *Re Rogers' Trusts*, 1 Dr. & S. 338. It was said in an early case that interest on mortgages ought not to run during a general national calamity: *Basil* v. *Acheson*, 4 Bro. P. C. 503.

(*u*) *Edwards* v. *Countess of Warwick*, 2 P. Wms. 171.

(*x*) 4 & 5 Will. IV. c. 22, s. 2; 33 & 34 Vict. c. 35.

(*y*) *Trevalion* v. *Anderton*, 66 L. J. Q. B. 489, C. A.

(*z*) *Re Marquis of Anglesey's Estate, Paget* v. *Anglesey*, L. R. 17 Eq. 283.

Interest in lieu of notice to pay off.

It is a general rule that a mortgagee is entitled to six months' notice from the mortgagor before being paid off, or to six months' interest in lieu thereof. This rule applies whether the notice to pay off is given by the mortgagor or mortgagee. It applies whenever there is default by the borrower in payment of the debt on the day on which the mortgage money was covenanted to be paid, but it does not apply to default on the day fixed for payment in the notice given by the mortgagee (*a*).

Where a day is fixed for payment in a foreclosure action, the mortgagor cannot redeem on an earlier day by payment of interest up to the time of payment only (*b*).

The rule does not apply where the mortgagee demands payment or himself takes proceedings to compel payment or enforce his security (*c*); and it has been held that taking possession amounts to taking proceedings to compel payment (*d*). Nor does the rule apply to an equitable mortgagee by deposit, but he is entitled to a reasonable time to look up the deeds (*e*).

Tender.

On the expiration of a six months' notice given by the mortgagor, if he has his money ready, and tenders the amount due (*f*), interest will stop (*g*), provided the mortgagor keeps the money ready to pay to the mortgagee (*h*), and makes no profit on it (*i*).

Proof of strict tender on the very day on which the six months expire will be requisite; for if strict tender is not made, the Court cannot stop interest (*k*).

The mortgagor should also, it is said (*l*), be ready to make oath that the money has always been ready, and no profit made of it, which fact may be controverted by the mortgagee, who

(*a*) *Edmondson* v. *Copland*, (1911) 2 Ch. 301, explaining *Bartlett* v. *Franklin*, 36 L. J. Ch. 671.

(*b*) *Hill* v. *Rowlands*, (1897) 2 Ch. 361, C. A.

(*c*) See *ante*, pp. 736, 737.

(*d*) *Bovill* v. *Endle*, (1896) 1 Ch. 648.

(*e*) *Fitzgerald* v. *Mellersh*, (1892) 1 Ch. 385.

(*f*) See further as to tender, *ante*, pp. 737 *et seq.*

(*g*) *Manning* v. *Burges*, 1 Ch. Ca. 29; *Lord Midleton* v. *Eliot*, 15 Sim. 531; *Woodman* v. *Higgins*, 14 Jur. 846.

(*h*) *Gyles* v. *Hall*, 2 P. Wms. 377; *Bank of New South Wales* v. *O'Connor*, 14 App. Ca. 273.

(*i*) *Edmondson* v. *Copland*, *sup.*

(*k*) *Bishop* v. *Church*, 2 Ves. Sen. 371. The requisites of tender have been already fully considered *ante*, pp. 737 *et seq.*

(*l*) *Lutton* v. *Rodd*, 2 Ch. Ca. 206.

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may prove the contrary, in which case the interest will run on (*m*).

Set-off of interest on mortgage against interest on legacy.

In one case (*n*) a question arose whether the devisee of an estate in mortgage was entitled to set off arrears of interest due at the date of the death of the mortgagor against the arrears of interest due on a legacy given by the mortgagee to the mortgagor for life, and not received by the mortgagor, who was one of the executors of the mortgagee; and it was decided that he was not, on the principle that until adjustment the debt still subsisted; and the debt and legacy might be separately assigned, for they were not extinguished.

Interest on legacy to pay off mortgage.

A sum of money bequeathed by the mortgagor to the same person to whom the estate in mortgage is devised, for the purpose of exonerating the mortgaged estate, will only carry interest as a legacy, though the mortgage intended to be satisfied therewith carry a higher rate of interest (*o*).

Judgment omitting interest.

Where judgment had been taken for less interest than was due, a bill to recover the omitted interest was dismissed (*p*).

Compromise.

Where a debt is to be ascertained under a compromise, interest does not run except from the time when the debt is ascertained (*q*).

Proviso limiting total amount to be recovered under mortgage.

Where a mortgage contained a proviso that the total amount to be recovered by the mortgagee under a mortgage should not exceed 900*l*., it was held that the proviso did not apply to interest, but only to the principal moneys due on the mortgage, and did not prevent the mortgagees from claiming interest over and above the 900*l*. (*r*).

Interest on collateral bond beyond penalty.

Where a mortgage and a bond were given to secure the same debt, it was held that the interest recoverable by the mortgagee was not limited to the amount of the penalty of the bond (*s*). But not so, where the mortgage is made a security only for the bond debt and the interest *to become due on the bond* (*t*).

(*m*) *Gyles* v. *Hall*, 2 P. Wms. 378; *Edmondson* v. *Copland*, *sup.*

(*n*) *Pettat* v. *Ellis*, 9 Ves. 563.

(*o*) *Lockhart* v. *Hardy*, 10 Beav. 292. It seems that in this case the mortgagee had foreclosed since the testator's death. And see 9 Beav. 379.

(*p*) *Darlow* v. *Cooper*, 34 Beav. 281.

(*q*) *Fowler* v. *Fowler*, 4 De G. & J. 250; *Wallington* v. *Willes*, 10 Jur. N. S. 906; *Caledonian Rail. Co.* v. *Carmichael*, L. R. 2 H. L. Sc. 56.

(*r*) *White* v. *City of London Brewery Co.*, 42 Ch. D. 237, C. A.

(*s*) *Clarke* v. *Lord Abingdon*, 17 Ves. 106.

(*t*) See *Hughes* v. *Wynne*, 1 My. & K. 20; *Clowes* v. *Waters*, 16 Jur. 632.

And it is said that if the bond debt be tacked to another security, interest will be allowed beyond the penalty (*u*).

Interest on tacked bond debt.

ii.—Rate of Interest.—The mortgage deed usually contains a covenant for payment of interest at a specified rate; and where this is the case questions can seldom arise, in taking the accounts, as to what is to be allowed in respect of interest, unless, indeed, the mortgagor claims to have made payments of interest which the mortgagee alleges to be still in arrear.

Repeal of usury laws.

Usury is no longer an offence against the law of England, all existing laws against usury having been repealed (*x*).

Interest, at what rate now allowable.

Generally, the interest may now be made payable at any rate, however high, which may be agreed upon by the parties (*y*).

Exorbitant rate of interest.

In setting aside dealings with expectant heirs, the exacting of an exorbitant rate of interest is an important consideration, notwithstanding the repeal of the usury laws (*z*).

Interest at market rate.

Sometimes a provision is inserted in the mortgage deed regulating the rate of interest according to the market rate; and in some instances the rate of interest is made to fluctuate according to fixed rules with the price of stock.

Deduction of income tax.

Income tax must be deducted from the interest, whether provided for in the mortgage or not (*a*); and such deduction must be allowed under a penalty (*b*); and all agreements for payment of any interest in full, without allowing the deduction of the income tax, are void (*c*).

Further income tax must be deducted even where interest is to be paid in a lump sum at the mortgagor's death if such interest is calculable by the year (*d*).

But not only has the mortgagor the right to make the deduction of income tax without express contract, he cannot even by contract deprive himself of this right; but though an express agreement that the deduction of the income tax shall not be allowed would be void under the Acts, the object of

(*u*) *Peers* v. *Baldwin*, 2 Eq. Ca. Ab. 611; *ante*, p. 83.

(*x*) 17 & 18 Vict. c. 90.

(*y*) *Webster* v. *Cook*, L. R. 2 Ch. 542; but see *ante*, p. 638.

(*z*) *Earl of Aylesford* v. *Morris*, L. R. 8 Ch. 484; *Beynon* v. *Cook*, L. R. 10 Ch. 389; *O'Rorke* v. *Bolingbroke*, 2 App. Ca. 814; *Nevill* v. *Snelling*, 16 Ch. D. 697. See further as to dealings with expectant heirs, *ante*, p. 633.

(*a*) 16 & 17 Vict. c. 34, s. 40. As to deduction of income tax in the case of insolvent estates, see *Re Green*, W. N. (1904) 105.

(*b*) 27 Vict. c. 18, s. 15.

(*c*) 5 & 6 Vict. c. 35, s. 103.

(*d*) *Re Craven's Mortgage*, (1907) 2 Ch. 448.

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receiving the interest in full at a given rate is attainable indirectly. For this purpose the rate of interest contracted for must be such that after deduction of income tax the remainder will be of the required amount. Hence, if the interest received is to preserve a uniform rate, that contracted for should be made to vary with the income tax. Should it be desired to stipulate for interest at a given rate—say, 4*l.* per cent., clear of income tax under all variations of the tax—perhaps the most convenient mode of framing the deed would be to require the mortgagor to covenant for payment of interest at 5*l.* per cent., and to add an agreement that upon payment within a specified time after each half-yearly day, interest shall be accepted at such a rate as, after deduction of income tax, will leave a clear remainder equal to a half-year's interest at 4*l.* per cent. per annum upon the principal sum secured (*e*).

Interest at increased rate.

It has been seen (*f*), that stipulations in a mortgage deed that the rate of interest shall be raised if not punctually paid are void as being in the nature of a penalty, but that a subsequent agreement for interest at an increased rate in consideration of forbearance of the mortgagee to call in the debt may be supported.

So, where by subsequent agreement between a first mortgagee and the mortgagor, to which a second mortgagee was not a party, the rate of interest on the first mortgage was increased, the payments of interest at the increased rate by a receiver of the mortgaged property were held to bind the second mortgagee until notice had been given by him to the receiver that his interest was in arrear (*g*).

Interest at reduced rate.

It has also been seen (*h*) that provisoes in mortgage deeds for reduction of the rate of interest on punctual payment are valid, and will be enforced, provided that any conditions annexed to the proviso, unless waived, are strictly performed. But a mortgagee in possession, whether on default of the mortgagor (*i*), or by arrangement with him (*k*), is entitled in account to charge interest at the unreduced rate.

(*e*) Dav. Conv. (4th ed.) vol. ii. pt. ii. p. 19. As to the validity of such agreements, see *Colbron* v. *Travers*, 12 C. B. N. S. 181; *Davies* v. *Fitton*, 3 Dr. & War. 225, 236; *Floyer* v. *Bankes*, 11 W. R. 630; *Beadel* v. *Pitt*, 13 W. R. 287.

(*f*) *Ante*, p. 136.

(*g*) *Law* v. *Glenn*, L. R. 2 Ch. 634.

(*h*) *Ante*, p. 136.

(*i*) *Union Bank of London* v. *Ingram*, 16 Ch. D. 53; *Cockburn* v. *Edwards*, 18 Ch. D. 449.

(*k*) *Bright* v. *Campbell*, 41 Ch. D. 388.

If a mortgage deed contains no covenant for payment of interest after the day fixed by the mortgage deed for payment of the principal, the rate at which interest is to be allowed to the mortgagee may be collected from other parts of the deed. So, where the recitals in a mortgage deed stated an agreement for interest at a specified rate, but there was no covenant or provision as to payment of interest in the other parts of the deed, it was held that the mortgagee was entitled to interest at that rate (*l*).

Rate allowed where no covenant for payment of interest after default.

Interest on a mortgage will be payable by way of damages, when interest is only provided for up to the day fixed for payment of the principal money, if payment is not made on that day (*m*). The rate of interest after the day will be measured by the rate of interest fixed by the mortgage deed if not more than five per cent., but, if the rate fixed exceeds five per cent., the interest will generally be calculated at five per cent. only (*n*). So, where a mortgage contained a covenant for payment of principal and interest at five per cent. on a specified day, but no provision for payment of subsequent interest, it was held that interest at five per cent. was payable after that day until repayment of the principal (*o*).

Interest where not provided for payable as damages.

Where the interest was reserved at a rate higher than five per cent. up to the day fixed for redemption, but the security did not expressly provide for payment of interest after that date, the rate was continued after the day of payment (*p*); but there is no rule that a further contract for the same rate of interest is to be implied. The rate is in the discretion of the Court (*q*).

But where, by a memorandum accompanying a deposit of deeds to secure a loan, it was agreed that the deed should be held as an equitable security for payment on a specified day of the principal and interest at $7\frac{1}{2}$ per cent. per annum, and that

Contract to continue to pay interest at specified rate implied in agreement for legal mortgage.

(*l*) *Ashwell* v. *Staunton*, 30 Beav. 52.

(*m*) *Price* v. *The Great Western Rail. Co.*, 16 M. & W. 244; 16 L. J. Ex. 87. And see 6 Man. & Gr. 64. See *Gordillo* v. *Weguelin*, 5 Ch. D. 303.

(*n*) *Cook* v. *Fowler*, L. R. 7 H. L. 27; *Re Roberts, Goodchap* v. *Roberts*, 14 Ch. D. 49, C. A. See *Wallington* v. *Cook*, 47 L. J. Ch. 508.

(*o*) *Mellersh* v. *Brown*, 45 Ch. D. 225.

(*p*) *Morgan* v. *Jones*, 8 Exch. 620. See *Wallis* v. *Bastard*, 4 De G. M. & G. 251; 17 Jur. 1107; *Dobson* v. *Land*, 4 De G. & S. 575; 14 Jur. 288.

(*q*) Per Lord Selborne, *Cook* v. *Fowler*, L. R. 7 H. L. 27; *Re Roberts, Goodchap* v. *Roberts*, 14 Ch. D. 49, C. A.

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the mortgagor should execute to the mortgagees a legal mortgage, it was held that the equitable security was liable to be converted into a legal mortgage containing all proper covenants for payment of interest, and, accordingly, that the mortgagees were entitled to interest at $7\frac{1}{2}$ per cent. after the day fixed for repayment of the loan until payment thereof (*r*).

Covenant to pay interest "during the continuance of the security."

A covenant to pay interest at a specified rate "during the continuance of the security" renders the covenantor liable to pay interest after default so long as any principal money remains unpaid (*s*).

Rule of law where contract does not mention interest.

The long-established rule at law, prior to the statute stated below, was that interest was not due on money, though secured by a written instrument, and though demand had been made, unless it appeared, on the face of the instrument, that interest was intended to be paid, or unless payment of interest was implied from the usage of trade, as in the case of mercantile instruments (*t*).

Power to allow interest by way of damages.

By the stat. 3 & 4 Will. IV. c. 42, ss. 28, 29, it is enacted that juries (*tt*) may, on the trial of any issue or inquisition of damages, allow interest on debts or sums certain, not exceeding the current rate of interest, from the time at which such debt was payable, if payable by virtue of some written instrument at a fixed time or, if payable otherwise, then from the time of demand; and may give damages in the nature of interest. But neither that statute nor 1 & 2 Vict. c. 110, s. 17, have any application to interest on arrears (*u*).

Fixed time.

It is sufficient if the time fixed for payment by virtue of the instrument is ascertained afterwards (*x*).

Demand.

A summons in a winding-up is a demand (*y*). A demand for a sum capable of being ascertained is a sufficient demand (*z*). But there must be a demand for a sum certain or ascertainable, and where the demand was for more than was due, no interest was allowed (*a*).

(*r*) *Exp. Furber, Re King*, 17 Ch. D. 191; and see *Re Drax*, (1903) 1 Ch. 781.

(*s*) *King* v. *Greenhill*, 6 Man. & Gr. 59.

(*t*) Per Bayley, J., in *Page* v. *Newman*, 9 B. & Cr. 378. See *London, Chatham and Dover Rail. Co.* v. *South Eastern Rail. Co.*, (1893) A. C. 429.

(*tt*) Or the Court: (1892) 1 Ch. p. 146.

(*u*) *Re Powell's Trust*, 10 Ha. 134; *Mansfield* v. *Ogle*, 4 De G. & J. 38.

(*x*) *Duncombe* v. *Brighton Club*, L. R. 10 Q. B. 371.

(*y*) *Exp. Alison*, L. R. 15 Eq. 394.

(*z*) *Lord Londesborough* v. *Mowatt*, 18 Jur. 1094, Ex. Ch.

(*a*) *Hill* v. *South Staffordshire Rail. Co.*, L. R. 18 Eq. 154; *London, Chatham and Dover Rail. Co.* v.

Except on a work and labour demand, where only four per cent. was allowed (*b*), five per cent. was generally given (*c*).

Rate of interest.

Interest runs after demand, notwithstanding payment into Court (*d*).

Payment into Court.

If the mortgage deed does not contain any covenant or agreement for payment of interest, it has long been the general rule in equity that the mortgagee is nevertheless entitled to interest from the date of the deed (*e*).

Rule where payment of interest is not provided for.

In such a case the rate of interest was formerly fixed at five per cent. (*f*). It has, however, been judicially intimated, and in fact decided, in several recent cases that the rules of the Court with regard to fixing the rate of interest ought to be revised having regard to the altered circumstances existing at the present day (*g*).

Rate of interest allowed in such cases.

Where a mortgage deed contained no covenant or other provision for payment of interest, but contained a proviso that the mortgagee should reconvey the mortgaged property on payment of the principal, it was held that the mortgage carried no interest (*h*).

Negation of right to interest implied.

Where an award was made under an order of Court of sums payable on two days certain by sale of securities, but no mention was made of interest, it was held that no interest was chargeable on the securities against subsequent assignees thereof, though the sale was delayed thirty years (*i*).

Interest at the rate of four per cent. from the date of the deposit is payable on a deposit of title deeds to secure a debt, if there is no stipulation for payment of interest in any memorandum accompanying the deposit (*k*).

Interest on deposit of deeds.

Where the mortgagee makes further advances without expressly stipulating as to the rate at which interest is to be paid,

Interest on further advances, &c.

South Eastern Rail. Co., (1893) A. C. 429. But see *Mackintosh* v. *Great Western Rail. Co.*, 4 Giff. 683.

(*b*) *Mildmay* v. *Methuen*, 3 Drew. 91.

(*c*) *Re East of England Bank. Co.*, L. R. 4 Ch. 18.

(*d*) *Hull and Selby Rail. Co.* v. *North Eastern Rail. Co.*, 5 De G. M. & G. 872.

(*e*) *Farquhar* v. *Morris*, 7 T. R. 124. See also *Anon.*, 4 Taunt. 876.

(*f*) *Ashwell* v. *Staunton*, 30 Beav. 52. See *Douglas* v. *Culverwell*, 4 De G. F. & J. 20; *Re Unsworth's Trusts*, 2 Dr. & S. 337; *Carter* v. *Palmer*, 8 Cl. & F. 657; *Macleod* v. *Jones*, 53 L. J. Ch. 534.

(*g*) *Re Goodenough, Marland* v. *Williams*, (1895) 2 Ch. 537; *Re Lambert, Moore* v. *Middleton*, (1897) 2 Ch. 169; *Re Barclay, B.* v. *Andrew*, (1899) 1 Ch. 674; *Re Whiteford, Inglis* v. *W.*, (1903) 1 Ch. 889.

(*h*) *Thompson* v. *Drew*, 20 Beav. 49. See *Hodge's Case*, 26 L. J. Bky. 77.

(*i*) *Collett* v. *Newnham*, 1 Drew. 447.

(*k*) *Ashton* v. *Dalton*, 2 Coll. 565; *Carey* v. *Doyne*, 5 Ir. Ch. R. 104;

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or is allowed to add to his debt costs, charges, and expenses properly incurred by him as mortgagee, which are treated as being in the nature of further advances, interest will generally be allowed at the same rate as on the original advance (*l*). But where an owner of property in Jamaica made two mortgages, the first carrying interest at ten per cent. and the second at eight per cent., and both the mortgages became vested in the same person, who entered into possession and expended large sums thereon, which were allowed in account, it was ordered that interest on the expenditure should be paid at the rate of six per cent., that being the legal rate of interest in Jamaica, on the principle that, in the absence of contract, that rate of interest which the law of the country has fixed must be allowed (*m*).

No interest allowed where payment delayed by mortgagee's misconduct.

Interest will not, as a general rule, be allowed on a debt the payment of which has been delayed by the conduct of the mortgagee (*n*). So, in a case where a man had mixed up the character of trustee, mortgagee and agent, the Court, on a decree for a reconveyance on further directions, refused to allow him interest on the balance originally found due to him by the Master's report (*o*).

Capitalization of interest not generally allowed in account.

iii.—Conversion of Interest into Principal.—The rule now is not to compute interest upon interest certified to be due, in the absence of express stipulation between the parties that the mortgagee shall be allowed to capitalize arrears of interest (*p*).

Rule in taking mortgage accounts.

In taking a mortgage account, although a different rule formerly prevailed (*q*), the rule now is that the time for payment is enlarged only upon terms of immediate payment of the interest and costs found due and the subsequent interest on the principal only, and subsequent costs are directed to be computed and taxed (*r*).

Kerr's Policy, L. R. 8 Eq. 331; *Re Drax*, (1903) 1 Ch. 781, 796.

(*l*) *Woolley* v. *Drag*, 2 Anst. 551.

(*m*) *Quarrell* v. *Beckford*, 1 Madd. 269, at p. 284.

(*n*) *Thornton* v. *Court*, 3 De G. M. & G. 293, 301; 17 Jur. 151. See *Meredith* v. *Bowen*, 1 Keen, 270 (debt not carrying interest).

(*o*) *Price* v. *Price*, 15 L. J. Ch. 13.

(*p*) *Quarrell* v. *Beckford*, 1 Madd. 269, 282; *Whatton* v. *Cradock*, 1 Keen, 267; *Brewin* v. *Austin*, 2 Keen, 211; *Daniell* v. *Sinclair*, 6 App. Ca. 181. See as to provisoes for capitalization of interest, *ante*, p. 139.

(*q*) *Turner* v. *Turner*, 1 J. & W. 46.

(*r*) *Whatton* v. *Cradock*, 1 Keen, 267, 269; *Jones* v. *Creswicke*, 9

But a distinction is, it seems, taken between a decree for a sale and for foreclosure. In the latter case the practice is as above stated. But in the case of a decree for sale the arrear of interest may, after the confirmation of the certificate, be converted into principal, and carry interest, but without prejudice to intervening mortgages, and other incumbrances (*s*).

Distinction between accounts in foreclosure and sale.

But in the case of a sale made in an administration suit, it seems that the order in the first instance is to compute interest on the principal only (*t*).

Sale in administration action.

An exception to this rule, moreover, prevails where a puisne mortgagee pays off a prior mortgage under a foreclosure or redemption decree; in which case, on payment to the prior mortgagee of the principal, interest and costs found due, he is allowed to claim interest on the aggregate amount as from the time of such payment (*u*). And, conversely, where successive redemptions are directed, and a puisne mortgagee fails to pay the amount found due from him to the first mortgagee for principal, interest and costs, and is accordingly foreclosed, then, in taking the account against the person next entitled to redeem, subsequent interest is computed on the whole sum, including interest, found due from him (*x*).

Exception to rule where puisne mortgagee pays off prior mortgage.

In accordance with the rule above referred to, if a mortgagee enters into possession, and the rents and profits of any year are not sufficient to keep down the interest, yet the mortgagee will not be allowed to capitalize the arrears and pay himself interest thereon out of the rents and profits of a subsequent year: but he will be allowed interest on costs and charges out of pocket (*y*).

When interest has once accrued due, it becomes a debt immediately recoverable, independently of the principal, by action on the covenant, or recoverable, together with principal and costs, by foreclosure or sale (*z*). Accordingly, even before the repeal of the Usury Laws, it was held that a mortgagor might agree with the mortgagee that, if the latter would

Capitalization of interest under subsequent agreement.

Sim. 304; *Coombe* v. *Stewart*, 13 Beav. 111.

(*s*) *Neal* v. *Att.-Gen.*, Mos. 246; *Harris* v. *Harris*, 3 Atk. 722; *Digby* v. *Craggs*, 2 Ed. 200; *Edwards* v. *Cunliffe*, 1 Madd. 287; *Monkhouse* v. *Corporation of Bedford*, 17 Ves. 380.

(*t*) *Whatton* v. *Cradock*, 1 Keen, 269; *Brewin* v. *Austin*, 2 Keen, 211.

(*u*) Seton (7th ed.), 1872.

(*x*) *Elton* v. *Curteis*, 19 Ch. D. 49.

(*y*) *Procter* v. *Cooper*, Prec. Ch. 116.

(*z*) *Sackett* v. *Bassett*, 4 Madd. 58, 64.

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forbear to sue or to enforce a sale, the former would pay him interest on the interest in arrear (*a*); and it is now well settled that there is no objection to a mortgagee requiring, in consideration of forbearance, that an account should be taken at any time, showing what is due for interest and costs, and that the amount so found should be added to the principal and thenceforth carry interest. If thought advisable, a fresh mortgage may be taken for the aggregate sum (*b*).

Puisne incumbrancers not bound.

The Court considers the arrears of interest so converted into principal by agreement between the parties in the light of a further advance. But inasmuch as a further loan made by a mortgagee, after notice of a puisne incumbrance, is not allowed to be tacked (*c*), but must be postponed to that incumbrance, it follows that a mortgagee will not be allowed to convert interest into principal, as against a subsequent charge of which he had notice at the time of the agreement (*d*).

Intention must be manifest.

The conversion of interest into principal must appear by the manifest intention of the mortgagor: it is not sufficient that an account be stated between the parties. As a general proposition it may be laid down, that the agreement that interest shall become principal and carry interest must be declared by writing under the hands of the parties (*e*). Such an agreement will not be implied on the ground of acquiescence from the fact that a mortgagor makes no objection to a formal notice given by the mortgagee to convert interest into principal if not then paid (*f*).

Presumption of agreement for capitalization.

In a case in Ireland, where the principal and interest found due on a judgment debt was decreed to be raised by sale of the estate against the tenant for life and remainderman, which sale was not made, but the tenant for life continued to pay interest on the gross sum during his life, the Court presumed an agreement between all parties to pay interest on the compound sum in consideration of a forbearance to enforce a sale (*g*).

(*a*) *Boddam* v. *Ryley*, 2 Bro. C. C. 2; *Macarthy* v. *Llandaff*, 1 Ba. & Be. 375; *Clancarty* v. *Latouche*, 1 Ba. & Be. 420, at p. 430; *Brown* v. *Barkham*, 1 P. Wms. 654; *Exp. Bevan*, 9 Ves. 222.

(*b*) *Blackburn* v. *Warwick*, 2 Y. & C. Ex. 92. As to what amounts to an agreement for conversion of interest into principal, see *Tompson* v. *Leith*, 4 Jur. N. S. 1091.

(*c*) See *post*, p. 1257.

(*d*) *Digby* v. *Craggs*, Amb. 612; 2 Ed. 290; *Montague* v. *Ratcliffe*, 2 Fonb. Eq. (Vol. II. 5th ed.) p. 438.

(*e*) *Brown* v. *Barkham*, 1 P. Wms. 654. See *Daniell* v. *Sinclair*, 6 App. Ca. 181, P. C.

(*f*) *Tompson* v. *Leith*, 4 Jur. N. S. 1091.

(*g*) *Macarthy* v. *Llandaff*, 1 Ba. &

In an early case (*h*), the infant heir of the mortgagor was held to be bound by an agreement for capitalization of arrears of interest, which was insisted on by the mortgagee as a condition for his abstaining from entry into possession, the agreement being clearly for the benefit of the infant, and made with the approval of her nearest relations. But it seems clear that this decision would not now be followed (*i*).

Agreement for capitalization held to bind infant.

In a case where interest ran in arrear, and in the mortgagee's accounts of arrears rests were made from time to time, on which interest was calculated, and ultimately a general account of all arrears, calculated on the footing of those rests, was signed by the mortgagor, and confirmed by a deed for securing the balance, although executed three years afterwards, the mortgagor was held liable (*k*).

Account with rests signed by mortgagor.

As between banker and customer there is no common law right to charge even simple interest on an overdraft, though the claim may be supported on the ground of custom or acquiescence (*l*). Such acquiescence will justify the charging compound interest or interest with rests so long as the relation of banker and customer exists and is not altered into that of mortgagee and mortgagor (*m*). The taking a mortgage to secure the fluctuating balance of an account is not, however, inconsistent with the relation of banker and customer so as to preclude compound interest (*n*).

Banker and customer.

After an account has been closed between bankers and a customer, compound interest will not be allowed on the balance of such account (*o*). Nor can bankers, if they take a mortgage to secure such balance or any other stated sum, stipulate therein for payment of compound interest (*p*). So when securities are deposited with bankers in respect of specific sums, they are only entitled to simple interest on such amount (*q*).

Settled account.

In a prior part of this treatise it has been seen (*r*), that

Arrears of interest

Be. 375. See *Conway* v. *Shrimpton*, 5 Bro. P. C. 187.

(*h*) *Earl of Chesterfield* v. *Lady Cromwell*, 1 Eq. Ca. Abr. 286.

(*i*) *Cottrell* v. *Finney*, L. R. 9 Ch. 541, 548.

(*k*) *Blackburn* v. *Warwick*, 2 Y. & C. Ex. 92.

(*l*) *Crosskill* v. *Bower*, *inf.*

(*m*) *Fergusson* v. *Fyffe*, *inf.*; *Williamson* v. *W.*, 7 Eq. 542; *London Chartered Bk. of Australia* v. *White*, 4 A. C. at 424.

(*n*) *National Bk. of Australasia* v. *United, &c.*, 4 A. C. 409.

(*o*) *Fergusson* v. *Fyffe*, 8 Cl. & F. 140.

(*p*) *Attwood* v. *Taylor*, 1 Man. & Gr. 300, 301. See as to creditors' deeds, *Crosskill* v. *Bower*, 32 Beav. 86.

(*q*) *London Chartered Bk. of Australia* v. *White*, 4 App. Ca. 413.

(*r*) *Ante*, p. 845.

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cannot be capitalized on transfer of mortgage.

the mortgagor not being bound by the settlement of accounts between the mortgagee and a transferee of the mortgage, *à fortiori* cannot be prejudiced by any agreement between them to increase the amount of the principal due, and consequently the arrears of interest cannot, generally speaking, be converted into principal, and added to the mortgage debt (*s*), unless the mortgagor joins in the transfer (*t*).

This rule is so strictly enforced that even where the transferee of a mortgage paid the whole arrears of interest in order to preserve the mortgaged property from a forced sale, though he was allowed the whole amount actually paid for interest and costs, including arrears of interest not included in the transfer deed, it was assumed that he could not be allowed interest on the arrears so paid (*u*).

Presumption of mortgagor's consent.

The consent of the mortgagor to the capitalization of arrears of interest paid by the transferee to the original mortgagee may be inferred, though the mortgagor is not actually a party to the deed of transfer, by implication from his conduct; as in *Ashenhurst* v. *James* (*x*).

Interest on unpaid rents.

Interest upon unpaid rents will not as a general rule be allowed as against the mortgagor (*y*).

Arrears of annuity do not carry interest except under special circumstances.

iv.—Interest on Arrears of Annuity.—It has long been a rule of the Court that interest will not be given on arrears of an annuity, although the annuity is charged on land, and secured by judgment (*z*), unless a special case is made (*a*). So in a foreclosure or redemption action as between incumbrancers and as against the property charged no interest as a rule will be allowed on such arrears (*b*). *Secus* in the ad-

(*s*) *Porter* v. *Hubbart*, 3 Atk. 271; *Earl of Macclesfield* v. *Fitton*, 1 Vern. 168; *Matthews* v. *Wallwyn*, 4 Ves. 118; *Chambers* v. *Goldwin*, 9 Ves. 254; *Mangles* v. *Dixon*, 3 H. L. C. 702.

(*t*) *Agnew* v. *King*, (1902) 1 Ir. R. 471.

(*u*) *Cottrell* v. *Finney*, L. R. 9 Ch. 541, 548.

(*x*) 3 Atk. 371. See *Macarthy* v. *Lord Llandaff*, 1 Ba. & Be. 375, *ante*, p. 1190.

(*y*) *Page* v. *Broom*, 4 Cl. & F. 437. See *Page* v. *Linwood*, 4 Cl. & F. 399; *Peers* v. *Sneyd*, 17 Beav. 151.

(*z*) *Jenkins* v. *Briant*, 16 Sim. 272; *Re Powell's Trusts*, 10 Ha. 134; *Taylor* v. *Taylor*, 8 Ha. 120; *Torre* v. *Browne*, 5 H. L. C. 555; *Edwards* v. *Warden*, 1 App. Ca. 305; *Re Hiscoe, H.* v. *Waite*, 71 L. J. Ch. 347.

(*a*) *Newman* v. *Auling*, 3 Atk. 579; *Tew* v. *Winterton*, 1 Ves. Jun. 451; *Martyn* v. *Blake*, 3 Dr. & War. 125; *Gay* v. *Cox*, 1 Ridg. P. C. 153; *Crosse* v. *Bedingfield*, 12 Sim. 35.

(*b*) *Re Salvin*, (1912) 1 Ch. 332, explaining *Mansfield* v. *Ogle*, 4 De G. & J. 38.

ministration of the estate of the grantor of the annuity (*c*); and it seems that if the annuitant had entered under his powers, the Court would not have obliged him to quit possession without receiving interest on the arrears (*d*). So if the delay in payment had arisen from the absence or conduct of the debtor, the Court would allow interest on the arrears (*e*). So where the bill was filed against the representatives of the grantor, but there was no conflict with other creditors, and the fund had been paid into Court in a former suit instituted by the annuitant, and had been accumulating for many years, and the annuitant had failed in obtaining administration to his debtor, interest was given on the arrears (*f*). Interest was also given on the arrears of an annuity secured by a bond, to the amount of the penalty of the bond (*g*); and where an annuity was secured by an assignment of stock, interest on the arrears of the annuity was allowed on a transfer of the fund (*h*).

Allowance of interest on arrears in administration actions.

It is a settled rule, in the administration of assets, that interest will not be allowed from the date of the order on debts which accrue due subsequently, and consequently not on instalments of an annuity accruing due after the date of the order (*i*).

Statute of Limitations.

v.—What Arrears of Interest are recoverable on taking Accounts.—By the stat. 3 & 4 Will. IV. c. 27, s. 42 (set out *ante*, p. 1020), it is provided that no arrears of interest in respect of any sum of money charged on land or rent shall be recoverable by distress, action, or suit for more than six years past.

Only six years' interest recoverable in action for foreclosure.

It is settled that, in an action for foreclosure, a mortgagee cannot recover more than six years' interest, even though the mortgage deed contains a covenant for payment of interest or is secured by a collateral bond conditioned for payment of interest, as the covenant or bond creates no charge on the land; though in an action on the personal covenant twenty years' arrears might have been recovered (*k*).

(*c*) *Lainson* v. *Lainson*, 18 Beav. 7; *Re Salvin*, *sup.*

(*d*) *Robinson* v. *Cumming*, 2 Atk. 409.

(*e*) *Booth* v. *Leycester*, 3 My. & Cr. 459; *O'Donel* v. *Browne*, 1 Ba. & Be. 262.

(*f*) *Hyde* v. *Price*, 8 Sim. 578.

(*g*) *Crosse* v. *Bedingfield*, 12 Sim. 35.

(*h*) *Colyer* v. *Clay*, 7 Beav. 188. But see *Jenkins* v. *Briant*, 16 Sim. 272.

(*i*) *Lainson* v. *Lainson*, 18 Beav. 7. See *Re Salvin*, *sup.*

(*k*) *Hunter* v. *Nockolds*, 1 Mac. &

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Reversionary interests.

It makes no difference in this respect that the mortgage is of a reversionary interest. So where the interest on the money secured by mortgage of a reversion in fee in real estate and by covenant was sixteen years in arrear, and the mortgagee filed his bill for foreclosure, raising no question on the liability under the covenant, it was held that, in taking the accounts under the decree for foreclosure, only six years' interest would be allowed (*l*).

From what time the statute runs.

Where a creditor comes in under a suit, the six years are reckoned from the time when the claim was carried in (*m*).

Limitation only applies where proceedings are taken by mortgagee to recover interest.

It is to be observed that sect. 42 of the stat. 3 & 4 Will. IV. c. 27, limits the right of a mortgagee of land to recover arrears of interest only in cases where he attempts to recover his interest by *distress, action, or suit;* in every other case his right is not limited, but is left as it was under the old law (*n*).

Mortgagee selling under power.

Accordingly, a mortgagee of land exercising his power of sale is entitled to retain out of the proceeds of sale in his hands whatever arrears of interest may be due to him, though extending over more than six years (*o*).

So where first mortgagees had sold the mortgaged property under their power, and received the proceeds of sale after judgment, in an action for the administration of the estate of the second mortgagee to which the first mortgagees were not parties, it was held that the first mortgagees were entitled to retain more than six months' interest (*p*).

Purchase-money of lands compulsorily taken paid into Court.

But where mortgaged lands had been compulsorily taken under the Lands Clauses Act (*q*), and the purchase-money had been paid into Court, and the assignees of a mortgage of the land presented a petition for payment to them of principal and interest from the date of their advance, and costs, it was held that the petition was analogous to a suit for recovery of land, and therefore six years' interest could alone be recovered (*r*).

G. 641; *Round* v. *Bell*, 30 Beav. 121; *Shaw* v. *Johnson*, 1 Dr. & S. 412; *Hughes* v. *Kelly*, 5 Ir. Eq. R. 286. Twelve years' arrears may apparently now be recovered under the covenant; see *ante*, p. 1021.

(*l*) *Sinclair* v. *Jackson*, 17 Beav. 405, approved in *Smith* v. *Hill*, 9 Ch. D. 143. See *Humble* v. *Humble*, 24 Beav. 535.

(*m*) *Hunter* v. *Nockolds*, 1 Mac. & G. 640; *Henry* v. *Smith*, 2 Dr. & War. 381, 382; *Greenway* v. *Bromfield*, 9 Ha. 201.

(*n*) Per Kay, J., in *Re Marshfield, Marshfield* v. *Hutchins*, 34 Ch. D. 721, at p. 723.

(*o*) *Edmunds* v. *Waugh*, L. R. 1 Eq. 421.

(*p*) *Re Marshfield, Marshfield* v. *Hutchins*, 34 Ch. D. 721.

(*q*) 8 Vict. c. 18.

(*r*) *Re Stead's Mortgaged Estates*, 2 Ch. D. 713.

Whether this decision is well founded or not, it does not apply where the mortgagor, and not the mortgagee, is applying to the Court for payment (*s*).

Creditors' suit.

It has been held in Ireland that an incumbrancer who avails himself of the proceedings in a creditors' suit is virtually a plaintiff, and is therefore not entitled to more than six years' interest (*t*).

But where the mortgagor of a share in an estate is himself seeking to obtain payment out of Court of the proceeds of sale of land sold in an administration action, he must pay all arrears of interest (*u*).

What arrears of interest are recoverable in redemption action.

If a mortgagor institutes a suit for redemption of the mortgaged lands, or counterclaims for redemption in a foreclosure action, this not being a suit to recover interest within the meaning of the Real Property Limitation Act, 1833, he will only be allowed to redeem on payment of all arrears of interest (*x*); and so where the proceeds of sale of land have come to the hands of the mortgagee (*y*).

Where interest is collaterally secured by bond or covenant.

It has been seen that a mortgagee cannot add a bond debt in account against the mortgagor (*z*). In one case it was considered that this rule only holds when the mortgage and bond debts are *several*, and not *parts of the same* debt; but this case was overruled (*a*). There does not seem to be ground for the difference hinted at by Mr. Cox, in his valuable notes to Peere Williams (*b*), as to the application of tacking to cases between a mortgagor coming to redeem, and a mortgagee bringing his bill to foreclose.

More than six years allowed against heirs of mortgagor.

In one case the plaintiffs, co-heirs of the mortgagor, were not allowed to redeem, except upon payment of twenty years' arrears, but the decision was expressly made on the ground that a mortgagee is allowed, as against the heir (although not against the original debtor himself), to tack an unsecured specialty, binding the heir, to the mortgage debt (*c*).

Express trusts.

Formerly, if a mortgage deed contained an express trust, or

(*s*) *Re Lloyd, Lloyd* v. *Lloyd*, (1903) 1 Ch. 385, C. A., overruling *Re Slater's Trusts*, 11 Ch. D. 227.

(*t*) *Re Owen Lewis*, (1903) 1 Ir. R. 348.

(*u*) *Re Lloyd*, (1903) 1 Ch. 385.

(*x*) *Dingle* v. *Coppen*, (1899) 1 Ch. 726.

(*y*) *Re Lloyd, sup.*

(*z*) See the judgment of Wigram, V.-C., in *Du Vigier* v. *Lee*, 2 Ha. 326, 339.

(*a*) *Hunter* v. *Nockolds*, 1 Mac. & G. 640, 650.

(*b*) 1 P. Wms. 777.

(*c*) *Elvy* v. *Norwood*, 5 De G. & S. 240; *Thomas* v. *Thomas*, 22 Beav. 341.

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a trust for sale for securing the mortgage debt or interest, the mortgagee in a foreclosure action might have recovered more than six years' arrears of interest (*d*).

But by the Real Property Limitation Act, 1874 (*e*), no action can be brought to recover any arrears of interest in respect of any sum of money secured by an express trust, or any damages in respect of such arrears, "except within the time within which the same would be recoverable if there were not any such trust."

What arrears recoverable in an action for foreclosure of personalty.

Mortgages of personalty, other than leasehold lands, are not within sect. 42, and there would seem to be no reason why a mortgagee of an interest in possession of personalty should not, in an action for foreclosure, recover more than six years' arrears of interest on his mortgage. A contrary view seems to have been taken by Bacon, V.-C., in one case (*f*), of a mortgage of a fund which had been paid into Court, and the mortgagor presented a petition for payment out, but the case has been overruled (*g*).

Reversionary interest in personalty.

In the case of a mortgage of a reversionary interest in personalty, the right to recover arrears remains alive so long as the interest remains reversionary. So, where a person mortgaged his reversionary interest under a will, the mortgagee was held entitled to recover the whole arrears of interest extending over sixteen years past (*h*). So where an action for foreclosure of a reversionary interest in personal estate was brought fourteen years after the date of the mortgage, during which period no interest was ever paid, and the usual decree was made, it was held that redemption could only be allowed on payment of interest for the full period of fourteen years (*i*).

vi.—Interest after Judgment.—Where a mortgagee has obtained judgment against the mortgagor for payment of the total amount found due upon taking the accounts for principal, interest and costs, the mortgage debt and the covenant, if any, in the mortgage deed for payment of principal and interest are

(*d*) See 3 & 4 Will. IV. c. 27, s. 25; *Lewis* v. *Duncombe*, 29 Beav. 175.

(*e*) 37 & 38 Vict. c. 57, s. 10, set out *ante*, p. 1111.

(*f*) *Re Slater's Trusts*, 11 Ch. D. 227, 239.

(*g*) *Re Lloyd*, *Lloyd* v. *Lloyd*, (1903) 1 Ch. 385, C. A.

(*h*) *Smith* v. *Hill*, 9 Ch. D. 143.

(*i*) *Mellersh* v. *Brown*, 45 Ch. D. 225. See also *Clarkson* v. *Henderson*, 14 Ch. D. 348, where there was a provision for capitalization of interest.

merged in the judgment, and thenceforth interest on the principal at the rate fixed by the mortgage deed will cease to be payable, but the total amount found due will carry interest as a judgment debt (*k*). Where, however, the mortgage is in such a form that the property cannot be taken out of the hands of the mortgagee without payment of full interest, the mortgagee is entitled to full interest, notwithstanding he has recovered judgment for the amount due (*l*).

By sect. 17 of 1 & 2 Vict. c. 110, it is provided that every judgment debt shall carry interest at the rate of four per cent. from the time of entering up the judgment or from the commencement of the Act, if then entered up (*m*).

A judgment entered up since the commencement of the Act will carry only four per cent. interest, though the original debt carried a higher rate (*n*); and a judgment to secure an annuity carries interest under this section (*o*).

From what time interest runs.

Interest runs on a judgment debt from the time of entering up judgment, or in case of judgments pronounced in Court from the date when so pronounced (*p*); and where money is paid into Court on a judgment, interest is not payable beyond the time when the money might have been taken out of Court (*q*).

Judgment for costs.

This section applies as well to judgments for costs payable by one party to another, as for the subject-matter of the action (*r*). On such a judgment, the interest runs from the date of the judgment or interlocutory order (*s*). But interest is not recoverable on costs directed to be raised out of an estate (*t*).

Practice in administration actions.

The payment of interest in administration actions is provided for by Order LV. as follows:—

Computation of interest on debts bearing interest.

R. 62. "Where a judgment or order is made directing an account of the debts of a deceased person, unless otherwise ordered, interest shall be computed on such debts, as to such of them as carry interest after the rate they respectively carry, and as to all

(*k*) *Re European Central Rail. Co.*, 4 Ch. D. 33. See *Exp. Higgins*, 3 De G. & J. 33.

(*l*) *Economic Life Ass. Soc.* v. *Usborne*, (1902) A. C. 147.

(*m*) See *Morse* v. *Tucker*, 5 Ha. 88.

(*n*) *Re European Central Rail. Co.*, 4 Ch. D. 33; *Exp. Fewings*, 25 Ch. D. 338; *Arbuthnot* v. *Bunsilall*, 62 L. T. 234. But see *sup.* n. (*l*).

(*o*) *Knight* v. *Bowyer*, 4 De G. & J. 619.

(*p*) Ord. XLI. r. 3; P. M. R. 17.

(*q*) *Sinclair* v. *Great Eastern Rail. Co.*, L. R. 5 C. P. 391.

(*r*) *Pitcher* v. *Roberts*, 2 Dowl. N. S. 394; *Newton* v. *Lord Conyngham*, 17 L. J. C. P. 288.

(*s*) *Taylor* v. *Roe*, (1894) 1 Ch. 413.

(*t*) *Att.-Gen.* v. *Nethercote*, 11 Sim. 529; *Re Marsden*, 40 Ch. D. 479.

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Allowance of interest on debts not carrying interest.

others after the rate of four per cent. per annum from the date of the judgment or order."

R. 63. "A creditor, whose debt does not carry interest, who comes in and establishes the same before the judge in chambers, under a judgment or order of the Court or of the judge in chambers, shall be entitled to interest upon his debt at the rate of four per cent. per annum from the date of the judgment or order out of any assets which may remain after satisfying the costs of the suit, the debts established, and the interest of such debts as by law carry interest."

Under this Order a creditor will not be entitled to interest on a debt carrying no interest, in preference to the payment of a voluntary debt (*u*); nor until the interest on debts carrying interest has been paid down to the date of payment (*x*).

In some cases a special order has been made as to the rate of interest (*y*): and interest will not in general be given from a period anterior to the date of the decree (*z*).

A creditor in an action for the administration of an insolvent estate is only entitled to interest up to the date of the judgment (*a*), and the same rule applies where an insolvent company is being wound up (*b*).

Section IV.

Accounts of Costs, Charges and Expenses.

i.—Right of Mortgagee to Costs, &c. generally.—It has been already remarked that equity regards the debt as the principal, and mortgaged property as a collateral security for the same; and although the property is absolutely forfeited at law, compels the mortgagee to permit his debtor to redeem (*c*); but, in so doing, it adheres to the settled principle, that he who seeks equity shall do equity to him from whom he requires it; and, therefore, the Court will make terms with the debtor before it will permit him to redeem, in order that full justice may be done to the creditor.

(*u*) *Garrard* v. *Lord Dinorben*, 5 Ha. 213; but see *Re Whitaker*, (1901) 1 Ch. 9.
(*x*) *Re Henley*, 75 L. T. 307.
(*y*) *Exp. Lintott*, L. R. 4 Eq. 184, 188; *Barrow's Case*, L. R. 3 Ch. 784.
(*z*) *Fowler* v. *Fowler*, 4 De G. & J. 250, 275.
(*a*) *Re Summers*, 13 Ch. D. 136.
(*b*) *Re Salt & Co.*, W. N. (1908) 63.
(*c*) *Ante*, p. 11.

Mortgagor entitled to add costs properly incurred to his security.

In accordance with this principle, it is a general rule that, in settling the accounts between mortgagor and mortgagee, the former, before being allowed to redeem, whether the action be for redemption or for foreclosure, or relate to any other question between those parties regarding the mortgage debt or security, shall pay not merely the principal and interest of the debt, but also all such costs as the mortgagee has properly incurred in enforcing, protecting, or preserving his security as against the mortgagor, or his surety. A mortgagee does not in terms contract for costs, but the rule is, that all costs which he, as mortgagee, properly incurs in relation to his security are to be allowed to him (*d*). Such costs will be added to the principal and interest secured by the mortgage and form one debt, which, as between the particular mortgagee and other incumbrancers, will rank in priority as if such costs had formed part of the moneys originally secured by that mortgage.

Priority of mortgagee's costs over puisne incumbrancers, &c.

The mortgagee retains his right to costs as against not only the mortgagor himself, but all subsequent incumbrancers (*e*) and other persons claiming under him or them, including a trustee in the bankruptcy of the mortgagor (*f*), so as to be entitled to be paid in full in priority to the claims of such persons. But it seems that the principle does not apply to costs incurred by the mortgagee in enforcing his security as against third parties (*g*), other than a surety (*h*).

No action for costs only.

Costs properly incurred are not the subject of an action by the mortgagee, although they are recoverable as the price of redemption (*i*).

Taxation of costs.

The costs to which a mortgagee is entitled in an action for foreclosure or redemption must be taxed as between party and party (*k*), unless otherwise specially directed. So a plaintiff in

(*d*) *Dryden* v. *Frost*, 3 My. & Cr. 670, 675; *Detillin* v. *Gale*, 7 Ves. 583, 585; *National Provincial Bank of England* v. *Games*, 31 Ch. D. 582, 592; *Re Baldwin's Estate*, (1900) 1 Ir. R. 15; *Sachs* v. *Ashby*, 88 L. T. 393.

(*e*) *Upperton* v. *Harrison*, 7 Sim. 444; *Barnes* v. *Racster*, 1 Y. & C. C. C. 401; *Sherbro*, 52 L. J. P. D. & A. 28; *Immacolata Concezione*, 9 P. D. 37.

(*f*) See *Lomax* v. *Hide*, 2 Vern. 185; *Detillin* v. *Gale*, *sup.*; *Cliff* v. *Wadsworth*, 2 Y. & C. C. C. 598; *Wilson* v. *Cluer*, 4 Beav. 214; *Wontner* v. *Wright*, 2 Sim. 543; *Roberts* v. *Williams*, 4 Ha. 129; *Price* v. *Price*, 15 L. J. Ch. 13; *Smith* v. *Green*, 1 Coll. 555; *Rider* v. *Jones*, 2 Y. & C. C. C. 320; *Matthie* v. *Edwards*, 2 Coll. 465; *Dunstan* v. *Patterson*, 2 Ph. 341.

(*g*) *Re Baldwin's Estate*, (1900) 1 Ir. R. 15.

(*h*) *Sachs* v. *Ashby*, 88 L. T. 393.

(*i*) *Exp. Fewings*, *Re Sneyd*, 25 Ch. D. 338, C. A.

(*k*) *Kestrel*, L. R. 1 A. & E. 78.

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a debenture holders' action is only entitled to party and party costs where the security is sufficient (*l*).

If a mortgagee brings an action on the covenant to recover the money, and his costs are taxed in that action as between party and party, the Court cannot, in a subsequent action for redemption, review the taxation in the former action, so as to allow to the mortgagees the costs of that action as between solicitor and client (*m*).

Taxation.

There was formerly a difficulty in a mortgagor obtaining the taxation of the bill of costs incurred by the mortgagee; but under 6 & 7 Vict. c. 73, ss. 38, 41, such taxation may be obtained by a mortgagor or his trustee in bankruptcy (*n*) either before or after payment; though in the latter case special circumstances must be shown, and an *ex parte* order for taxation cannot be obtained (*o*), and statements of errors or overcharges must be specific (*p*); nor will slight overcharges support such an application, unless there be undue pressure or surprise on the part of the solicitor (*q*), and without such ground mere payment under protest will not avail the mortgagor (*r*); though where the overcharges are so gross as to amount to fraud or improper conduct, the Court will grant relief after any length of time, though payment be made without protest (*s*).

But on the taxation the mortgagor is entitled to have the taxation limited to items incurred by the mortgagee strictly in his position of mortgagee, and therefore items which the mortgagor would not be liable to pay as between himself and the mortgagee must be disallowed, even though the solicitor would be entitled to charge them as against his client the mortgagee, and even though incurred by the special instructions of the mortgagee (*t*).

Appeal as to costs in mortgage actions.

In ordinary cases costs are within the discretion of the judge (*u*), and no appeal will lie against an order as to costs only except by leave of the Court or judge making such

(*l*) *Re Queen's Hotel, Cardiff*, (1900) 1 Ch. 792; *post*, p. 1213.
(*m*) *Morley* v. *Bridges*, 2 Coll. 621.
(*n*) *Re Allingham*, 32 Ch. D. 36.
(*o*) *Re Carew*, 8 Beav. 150; *Re Griffith & Co.*, 53 L. J. Ch. 303.
(*p*) *Dunt* v. *Dunt*, 9 Beav. 146.
(*q*) *Re Wills*, 8 Beav. 416; *Re Jones*, 8 Beav. 479; *Re Harrison*, 10 Beav. 57.
(*r*) *Re Harrison*, *sup.*
(*s*) *Horlock* v. *Smith*, 2 My. & Cr. 495, 510.
(*t*) *Re Longbotham & Sons*, (1904) 2 Ch. 152, C. A.; *Re Cohen & Cohen*, (1905) 2 Ch. 137, overruling *Re Holliday*, 58 L. T. 301.
(*u*) Jud. Act, 1890 (53 & 54 Vict. c. 44), s. 5.

order (*x*). But the right of a mortgagee, like that of a trustee, forms an exception to this rule, and is not in the discretion of the Court or a judge, unless the mortgagee has been guilty of misconduct (*y*).

By the Ord. LXV. r. 1, it is provided as follows:—

Costs to be in the discretion of the Court.

"Subject to the provisions of the Acts and these Rules, the costs of and incident to all proceedings in the Supreme Court, including the administration of estates and trusts, shall be in the discretion of the Court or judge: Provided that nothing herein contained shall deprive an executor, administrator, trustee, or mortgagee who has not unreasonably instituted or carried on or resisted any proceedings, of any right to costs out of a particular estate or fund to which he would be entitled according to the rules hitherto acted upon in the Chancery Division."

Mortgagee's right to costs is matter of contract.

The right of a mortgagee to his costs arises out of the mortgage contract itself, which makes the mortgage a security not only for principal and interest and such ordinary charges and expenses as are ordinarily provided for by the instrument creating the security, but also for the costs properly incident to a suit for foreclosure or redemption, or an action in the nature of a redemption action (*z*). This right, unless lost, is not within the discretion of the judge, and can only be lost by such inequitable conduct on the part of a mortgagee as may amount to a violation or culpable neglect of his duty under the contract (*a*).

Appeal by mortgagee.

It follows that if the judge wrongfully deprives the mortgagee of his costs, charges and expenses properly incurred, on the ground that his right by contract is lost, then the mortgagee has a right of appeal (*b*).

Appeal by mortgagor.

The mortgagor has apparently no right of appeal as to costs. If the mortgagee has been guilty of no misconduct, he has a right to his costs, and there can be no appeal. If the mortgagee has been guilty of misconduct, the mortgagee's right as such is lost, but in that case the costs become costs within the discretion of the judge, with which the Court of Appeal cannot interfere (*c*). The Court of Appeal has only to see whether there

(*x*) Jud. Act, 1873 (36 & 37 Vict. c. 66), s. 49.

(*y*) *Cotterell* v. *Stratton*, L. R. 8 Ch. 295; *Turner* v. *Hancock*, 20 Ch. D. 303, C. A.

(*z*) *Williams* v. *Jones*, 55 Sol. Jo. 500.

(*a*) *Anon.*, 2 Eq. Ca. Abr. 237; *Cotterell* v. *Stratton*, L. R. 8 Ch. at p. 302.

(*b*) *Charles* v. *Jones*, 33 Ch. D. 80, C. A.

(*c*) *Charles* v. *Jones*, *sup.* See *Re Beddoe*, *Downes* v. *Cottam*, (1893) 1 Ch. 547, 556, 560.

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has been such conduct; and if there has been, no appeal lies (*d*).

Right of equitable mortgagee to costs.

As a general rule an equitable mortgagee is entitled to the same costs as a legal mortgagee (*e*); save in bankruptcy, in a case where there is no written memorandum accompanying the deposit of title deeds (*f*).

Misconduct.

In a recent case (*g*) Eve, J. said that the cases of *Charles* v. *Jones* (*h*), *Hall* v. *Heward* (*i*), and *Ashworth* v. *Lord* (*k*) established three propositions: (1) That a mortgagee has an absolute right to costs unless they are forfeited by misconduct; (2) that if the right is forfeited by misconduct, the costs are in the discretion of the judge; and (3) that the raising of an untenable defence or a claim of a balance due after the mortgage has been fully paid off both constitute misconduct. But it does not seem to be the rule that in every case where a mortgagee has been overpaid he must pay the costs.

When a mortgagee may be deprived of his costs.

The mortgagee will also be refused his costs of an action for enforcing or redeeming the security if he be guilty of serious misconduct, as in the following cases:—fraudulent and unfair dealing (*l*); rendering a redemption suit necessary by refusing as mortgagee in possession to render an account (*m*); dealing with the mortgagor behind the back of an incumbrancer whose claim was known to him, and attempting to deprive the latter of his security (*n*); making a claim under an illegal contract (*o*).

Unfounded resistance to right of redemption.

Where a second mortgagee brought an action to redeem the first mortgagees and foreclose the mortgagor; the first mortgagees denied the plaintiff's right to redeem except on paying off not only the prior mortgage, but also a further charge which was held, for want of registration, to have no priority over the plaintiff's charge; the Court below did not give the first mortgagees their costs, but refused to make them pay to the plaintiff the costs occasioned by their unfounded claim on the ground

(*d*) *Smallprice* v. *Lee*, 30 Sol. Jo. 61.

(*e*) *Lewis* v. *John*, 9 Sim. 366. And see *Connell* v. *Hardie*, 3 Y. & C. Ex. 582; *Reg.* v. *Chambers*, 4 Y. & C. Ex. 54; *Wade* v. *Ward*, 4 Drew. 602.

(*f*) *Exp. Brightens*, 1 Swanst. 3; *Exp. Trew*, 3 Madd. 372. And see other cases cited *ante*, p. 1137, note (*m*).

(*g*) *Heath* v. *Chinn*, W. N. (1908) 120.

(*h*) 33 Ch. D. 80.

(*i*) 32 Ch. D. 430.

(*k*) 36 Ch. D. 545.

(*l*) *Moroney* v. *O'Dea*, 1 Ba. & Be. 109, 121, n.

(*m*) *Powell* v. *Trotter*, 1 Dr. & S. 388.

(*n*) *Taylor* v. *Baker*, Dan. 82.

(*o*) *Johnson* v. *Williamshurst*, 1 L. J. Ch. 112.

that there had been a want of caution on the part of the plaintiff (*p*); and on appeal, Lord Cairns, C., was of opinion that the first mortgagees had been treated with indulgence (*q*).

Refusal to account.

In a suit by a second mortgagee against the first mortgagee, who had sold and alleged untruly that there was not sufficient to pay him, and neglected to account, no costs were given on either side (*r*).

Unfounded charges of fraud.

So also where a mortgagee in a foreclosure action made unsustained charges of fraud against the mortgagor, he was disallowed all costs occasioned by his improper conduct (*s*).

When a mortgagee may be made to pay costs of other parties.

In some cases where the mortgagee has been guilty of very gross misconduct, he may not only be deprived of his costs, but may be made to pay the whole of the costs of all parties (*t*). But though, as a general rule, a mortgagee will be made to pay all costs which his unnecessary and oppressive dealings have occasioned, yet the Court will not make him pay all the costs of the action except under special circumstances and upon great consideration (*u*).

Where nothing is due to mortgagee.

If a mortgagee commence an action for foreclosure, or pray a sale, and it is found that nothing was due to him when he brought his action, he will be decreed to pay all the costs, including those of the reference and taking the accounts (*x*).

Where mortgagee is guilty of unreasonable conduct.

In a case where a mortgage was vested in three trustees, a day was fixed for paying off the mortgage, and a deed of reconveyance was prepared; the mortgagor attended with the money, but one of the trustees, who had a partial beneficial interest in the money, refused to execute the deed unless the interest was paid to himself on his sole receipt, and otherwise acted in an unreasonable manner; the second trustee refused to attend, as he would not meet the third trustee on the ground of a personal quarrel: it was held that, inasmuch as the mortgagor was prevented from paying the debt by a disagreement between the parties entitled to receive the money, whereby an action for

(*p*) *Credland* v. *Potter*, L. R. 18 Eq. 350. See *Tomlinson* v. *Gregg*, 15 W. R. 51; *Kinnaird* v. *Trollope*, 42 Ch. D. 610; *Tarn* v. *Turner*, 39 Ch. D. 456.

(*q*) *Credland* v. *Potter*, L. R. 10 Ch. 8, 13.

(*r*) *Tanner* v. *Heard*, 23 Beav. 555. See *Williams* v. *Jones*, 55 Sol. Jo. 500.

(*s*) *West* v. *Jones*, 1 Sim. N. S. 205, 218. See *Cockell* v. *Taylor*, 15 Beav. 103, 128. But see *Hayward* v. *Kersey*, 14 W. R. 999.

(*t*) See *Harvey* v. *Tebbutt*, 1 J. & W. 197, 202; *Rourke* v. *Robinson*, (1911) 1 Ch. 480.

(*u*) *Detillin* v. *Gale*, 7 Ves. 583.

(*x*) *Binnington* v. *Harwood*, T. & R. 477; *Morris* v. *Islip*, 23 Beav. 244; *Montgomery* v. *Calland*, 14 Sim. 81.

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redemption was rendered necessary, the first trustee having made a plainly untenable demand, and being mainly the cause of the action, must pay all the mortgagor's costs thereof; that the second trustee, having also caused embarrassment, must be disallowed his costs; but that the third trustee, being blameless, was entitled to his costs, to be added to the mortgagor's costs and paid by the first trustee (*y*).

Proceeding after tender.

So after payment or tender of the amount due by the mortgagor (*z*), or anyone representing him, or by a *puisne* incumbrancer (*a*); and, whether before or after action, if the mortgagee refuses such tender, or proceeds after payment, he must pay the costs of suit or the subsequent costs, as the case may be (*b*).

Where the costs are unascertained and the security ample, or a sufficient sum is tendered to cover the costs, the mortgagee will proceed at his peril (*c*).

But if the mortgagor make no tender, but merely offer to pay the amount due and costs, he will not save the costs (*d*).

Where a tender has been made and refused, the application that the mortgagee may pay the costs may be made by motion supported by affidavits of tender and refusal (*e*).

Groundless claim by mortgagee.

Where a mortgagor made a definite offer to redeem, which the mortgagee unreasonably refused, setting up a groundless claim to consolidate another mortgage, it was held by the Court of Appeal that, as the refusal was the sole cause of the litigation, the mortgagee must pay to the mortgagor all his costs of the action up to and including the trial as well as the costs of the appeal (*f*).

Fraud.

In a case where the mortgage transaction was tainted by gross fraud on the part of the mortgagee, who also set up an untenable resistance to the right of redemption, he was decreed to

(*y*) *Cliff* v. *Wadsworth*, 2 Y. & C. C. C. 598. See *Rourke* v. *Robinson*, (1911) 1 Ch. 480.

(*z*) *Roberts* v. *Williams*, 4 Ha. 129; *Wilson* v. *Cluer*, 4 Beav. 214; *Morley* v. *Bridges*, 2 Coll. 621. And see *Lord Cranstown* v. *Johnston*, 5 Ves. 277, 279; 1 Hov. Suppl. 355; *Harmer* v. *Priestley*, 16 Beav. 569; *Gregg* v. *Slater*, 22 Beav. 314; *Hosken* v. *Sincock*, 11 Jur. N. S. 477.

(*a*) *Smith* v. *Green*, 1 Coll. 555.

(*b*) *Johnson* v. *Evans* (No. 1), 60 L. T. 29. See *Edmondson* v. *Copland*, (1911) 2 Ch. 301; *Rourke* v. *Robinson*, (1911) 1 Ch. 480; *Webb* v. *Crosse*, (1912) 1 Ch. 323.

(*c*) *Jenkins* v. *Jones*, 2 Giff. 99; *Morley* v. *Bridges*, 2 Coll. 621; *Broad* v. *Selfe*, 9 Jur. N. S. 886.

(*d*) *Gammon* v. *Stone*, 1 Ves. Sen. 339. But see *Sentance* v. *Porter*, 7 Ha. 426.

(*e*) *Sentance* v. *Porter*, 7 Ha. 426.

(*f*) *Squire* v. *Pardoe*, 66 L. T. 243.

pay all the costs of the action up to the hearing (*g*). And a similar order was made in the case of a suit by a mortgagor for relief on the ground of fraud and extortion on the part of the mortgagee who was his counsel, on the ground that the mortgagee had abused the trust reposed in him, and manifested an intention to get the estate into his own hands (*h*).

Improper joinder of parties.

As a general rule, the mortgagee will be ordered to pay all costs caused by his improper joinder of parties, whether as plaintiffs or defendants (*i*). So, where a devisee of a mortgagee filed his bill against the heir and executor of the mortgagor for foreclosure, and also against the heir-at-law of the mortgagee for establishing the will, it was ordered that the plaintiff should pay the heir of the mortgagee his costs, and that he should not be entitled to have them from the estate (*k*). A distinction will, of course, be drawn between the beforementioned case, and the case of costs arising from the nature of the assurance required in the conveyance of the mortgaged estate; as, for example, if the mortgagor become bankrupt and his trustee is made party to the action and disclaim all interest (*l*); in which cases the expenses must be borne by the mortgagor or his trustee, unless in the case of a disclaimer the trustee is unnecessarily made party to the action of foreclosure (*m*).

Similarly, where a mortgagee, praying a sale of the mortgaged property, brought certain prior annuitants before the Court, he was ordered to pay their costs on the ground that they were unnecessary parties, as the property ought to be sold subject to their annuities (*n*). So, where a mortgagee with a power of sale unnecessarily brought an action for sale under a decree of the Court, subsequent incumbrancers appearing and consenting to such sale were allowed their costs out of the estate which was insufficient to pay the mortgagee in full (*o*).

(*g*) *Baker* v. *Wind*, 1 Ves. Sen. 160. See *Douglas* v. *Culverwell*, 4 De G. F. & J. 20.

(*h*) *Thornhill* v. *Evans*, 2 Atk. 330.

(*i*) *Pearce* v. *Watkins*, 5 De G. & S. 317; *Booth* v. *Creswicke*, 8 Sim. 352; 13 L. J. Ch. 217; *Coles* v. *Forrest*, 10 Beav. 552; *Cockell* v. *Taylor*, 15 Beav. 103. See *Collins* v. *Shirley*, 1 R. & My. 638; *Rochfort* v. *Battersby*, 2 H. L. C. 288.

(*k*) *Skipp* v. *Wyatt*, 1 Cox, 353.

(*l*) *Collins* v. *Shirley*, 1 R. & My. 638; *Appleby* v. *Duke*, 1 Ph. 272; *Cash* v. *Belcher*, 1 Ha. 310; *Weaving* v. *Count*, 6 Sim. 439; *Peake* v. *Gibbon*, 2 R. & My. 354. As to the costs of a party disclaiming, see *inf.* p. 1213.

(*m*) *Thompson* v. *Kendall*, 9 Sim. 397.

(*n*) *Delabere* v. *Norwood*, 3 Swanst. 144, n. See *Horrocks* v. *Ledsam*, 2 Coll. 208.

(*o*) *Wontner* v. *Wright*, 2 Sim.

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But where the plaintiff made a person a party to the action with reasonable excuse, he was not made to pay any costs occasioned by the misjoinder (*p*).

Improper conduct of action.

On the same principle, the mortgagee will generally be ordered to pay to the mortgagor all additional costs caused by improperly framing his action, or by unnecessary or vexatious proceedings therein.

So, where the plaintiff originally filed a bill against the defendant as his agent, praying an account against him on that footing, but having been found, on trial of an issue, to be mortgagee, he converted the suit into a foreclosure suit; it was held that he must pay to the defendant all costs sustained by him beyond what he would have been put to if the bill had been originally a bill for foreclosure, including the costs of the issue at law (*q*).

So, where an action ought to have been brought in a County Court, only County Court costs will be allowed (*r*).

Again, where in a suit for delivery up of a post-obit bond on payment of principal and interest, the plaintiff had obtained an injunction against proceedings by the defendant at law, a motion to dissolve the injunction was held to be improper, and was accordingly dismissed with costs (*s*).

Adducing unnecessary evidence.

The mortgagee will also be fixed with any costs caused by his adducing unnecessary evidence (*t*). So, where in a foreclosure action the mortgagor put in no defence, the costs of the mortgagee's affidavits were disallowed (*u*).

Loss of deeds, &c.

So, also, if the costs are increased by loss of the title deeds of the mortgaged property (*x*), or of vouchers, thereby causing additional costs of account (*y*).

Mixing up distinct claims.

So, also, a mortgagee was held liable to pay the additional costs caused by the inconvenient method adopted by him in

543; *Cooke* v. *Brown*, 4 Y. & C. Ex. 227; *Alston* v. *Parker*, 5 L. J. Ch. 3; but see *Grace* v. *Mountmorris*, 2 Dr. & War. 432.

(*p*) *Alexander* v. *Simms*, 20 Beav. 123.

(*q*) *Smith* v. *Smith*, G. Cooper, 141. See *Briant* v. *Lightfoot*, 1 Jur. 20; *Philips* v. *Davies*, 7 Jur. 52.

(*r*) *Crozier* v. *Dowsett*, 31 Ch. D. 67.

(*s*) *Marsack* v. *Reeves*, 6 Madd. 108. See *Exp. Fletcher*, Mont. 454; *Cocks* v. *Stanley*, 4 Jur. N. S. 942.

(*t*) *Harvey* v. *Tebbutt*, 1 J. & W. 197; *Audsley* v. *Horn*, 26 Beav. 195, 200.

(*u*) *Perpetual Investment Building Soc.* v. *Gillespie*, W. N. (1882) 4.

(*x*) See cases collected *ante*, pp. 842, 843.

(*y*) *Price* v. *Price*, 15 L. J. Ch. 13.

mixing up several distinct characters of mortgagee, trustee, and agent (*z*).

Assignment of mortgage after decree.

And if, after a decree to account, the mortgagee assigns over his mortgage, he must pay the costs of and incident to the bringing the assignee before the Court (*a*).

Groundless defence, &c.

A fortiori, a mortgagee must generally pay all costs occasioned by setting up a groundless defence, as, for instance, improperly resisting the right of redemption (*b*); insisting that the mortgage was an absolute conveyance (*c*), or setting up the Statutes of Limitation (*d*); setting up charges of fraud or connivance which he cannot substantiate (*e*); and a mortgagee has been compelled to pay the costs of a suit rendered necessary by third parties in consequence of his unjust claims, though not the costs of the mortgagor or his assignees, co-defendants with him in such suit, if necessary parties (*f*); and the costs of a suit to set aside a sale by the mortgagee under a power as oppressive upon the mortgagor (*g*).

In some cases, where the right of redemption is doubtful, the suit has been dismissed without costs (*h*).

Where a mortgagee improperly resists redemption, and on taking the accounts a balance is found to be in his hands, the Court has power to charge him with interest on such balance, though he has not been in possession of the mortgaged premises (*i*).

But where a mortgagee insisted on an objection on a point of fact, to which the Court attached so much weight as to direct an issue, he was not made to pay the costs of the issue, though his objection was overruled (*k*).

(*z*) *Capper* v. *Terrington*, 1 Coll. 103.

(*a*) *Barry* v. *Wrey*, 3 Russ. 465; *Coles* v. *Forrest*, 10 Beav. 552. See *Jones* v. *Harding*, 24 L. J. Ch. 749.

(*b*) *Harvey* v. *Tebbutt*, 1 J. & W. 197; *Whitfield* v. *Parfitt*, 4 De G. & S. 244; 15 Jur. 852; *Perkins* v. *Bradley*, 1 Ha. 233; *Wheaton* v. *Graham*, 24 Beav. 483; *Powell* v. *Roberts*, L. R. 9 Eq. 171; *Ashworth* v. *Lord*, 36 Ch. D. 545; *Kinnaird* v. *Trollope* (No. 2), 42 Ch. D. 610; *Squire* v. *Pardoe*, 66 L. T. 243.

(*c*) *England* v. *Codrington*, 1 Ed. 169.

(*d*) *Moore* v. *Painter*, 6 Jur. 903; *Ashworth* v. *Lord*, *sup.*

(*e*) *Green* v. *Briggs*, 6 Ha. 632; *West* v. *Jones*, 1 Sim. N. S. 218. See *Price* v. *Berrington*, 3 Mac. & G. 486, 499.

(*f*) *Green* v. *Briggs*, *sup.* See *Mocatta* v. *Murgatroyd*, 1 P. Wms. 393; *Harryman* v. *Collins*, 18 Beav. 11.

(*g*) *Matthie* v. *Edwards*, 2 Coll. 465, though reversed on appeal on the principal point, *Jones* v. *Matthie*, 11 Jur. 504. And see *Rider* v. *Jones*, 2 Y. & C. C. C. 329.

(*h*) *Kirkham* v. *Smith*, 1 Ves. Sen. 257; *Teulon* v. *Curtis*, Yo. 610.

(*i*) *Smith* v. *Pilkington*, 1 De G. F. & J. 120; *Eley* v. *Read*, 76 L. T. 39, C. A.

(*k*) *Wilson* v. *Metcalfe*, 3 Madd. 45.

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Setting up groundless claim in redemption action.

If a mortgagee by his defence in a redemption action claims payments to which he is not entitled, he will be made to pay the costs occasioned by his improper conduct (*l*).

Costs allowed to mortgagee raising *bonâ fide* a claim which is overruled.

Inasmuch as a mortgagee is always considered as entitled to costs, unless there be something of positive misconduct, the mere extension of his claim beyond what the Court finally decides that he is entitled to is no ground for refusing him his costs (*m*).

So, also, where mortgagees in possession of a colliery made a claim, the amount of which was disputed, and refused to furnish accounts to the mortgagors, except on being paid the expenses of so doing, it was held that their conduct was not so vexatious as to deprive them of their right to their costs of the action to redeem the property (*n*).

So, in a recent case, where a mortgagee claimed that the mortgagor was not entitled to redeem except on payment of a sum not expressly mentioned in the mortgage deed, but which was held by the Court of Appeal (reversing the decision of the Court below) to be covered by the security, it was said that a mortgagee cannot be deprived of his costs merely because he sets up a *bonâ fide* claim to something more than the Court holds him to be entitled to (*o*). And this decision was followed in a case where the mortgagee set up a claim to consolidate, which was fairly open to argument, but was disallowed (*p*).

Death of mortgagee before payment of costs.

When a mortgagee, being liable to costs, dies before payment, and his executors bring a new action for foreclosure without reviving, they cannot recover any costs in the second action unless they submit to pay the testator's costs in the first suit (*q*).

General costs allowed.

Although, where a mortgagee, by his misconduct or mismanagement, has increased the costs of an action for foreclosure or redemption, he will be fixed with such additional costs, he will, as a rule, be allowed his general costs of the action (*r*).

(*l*) *Snagg* v. *Frizell*, 3 J. & L. 383.

(*m*) *Loftus* v. *Swift*, 2 Sch. & L. 657; *Cotterell* v. *Stratton*, L. R. 8 Ch. 295.

(*n*) *Norton* v. *Cooper*, 5 De G. M. & G. 728.

(*o*) *Re Watts*, *Smith* v. *Watts*, 22 Ch. D. 1, C. A.

(*p*) *Bird* v. *Wenn*, 33 Ch. D. 215. But see *Squire* v. *Pardoe*, 66 L. T. 243, C. A.

(*q*) *Long* v. *Storie*, 9 Ha. 542.

(*r*) *Whitfield* v. *Parfitt*, 4 De G. & S. 240; *Price* v. *Berrington*, 7 Ha. 384. See *Cowdry* v. *Day*, 5 Jur. N. S. 1200; *Deeley* v. *Lloyds Bank* (No. 2), 53 Sol. Jo. 419; *Heath* v. *Chinn*, *ante*, p. 1202.

The mortgagee is entitled to general costs, notwithstanding that rests are directed (*s*), if any sum was due when the action was brought (*t*), and notwithstanding an over-statement of account, or extending his claim too far, or a refusal to furnish accounts (*u*).

Mortgagee becoming insolvent.

Where a mortgagee would, if solvent, have been fixed with any costs, if he become insolvent and so unable to pay, he will not receive his general costs (*x*).

General costs disallowed where gross misconduct of mortgagees.

In a case where, in a redemption action, the mortgagee charged the mortgagor with excessive amounts, so that, in making the inquiry as to what was due from the mortgagor, great delay and expense was incurred before the account could be taken, the mortgagee was not only made to pay the costs occasioned by his conduct, but was disallowed his general costs from his answer (*y*).

No review of costs after decree.

Where the original decree has directed the costs of the mortgagee to be taxed and paid to him, it seems that he will be entitled to his costs without exception as to any part of the cause, though it appears at the hearing on further directions, that the debt was paid off before the commencement of the suit and that he has set up an improper defence (*z*).

The objection to the form of decree must be made at the hearing, for the Court will not, on grounds which might then have been urged, review the taxation (*a*).

Exception where costs are reserved.

If, however, the question how costs are to be paid has been reserved by the judgment, the Court has power to order the mortgagee to pay the costs, if it appear that his claim was not well founded (*b*).

Where payment is alleged, the usual course is to reserve the costs until the result of the account is certified, and, to save the expense of coming to the Court on further consideration, a direction that the mortgagee shall pay the costs if the amount

(*s*) As to taking accounts with rests, see *post*, pp. 1234 *et seq.*

(*t*) *Barlow* v. *Gains*, 23 Beav. 244.

(*u*) *Norton* v. *Cooper*, 5 De G. M. & G. 728; *Cotterell* v. *Stratton*, L. R. 8 Ch. 295, L. C. & J.; *Cottrell* v. *Finney*, L. R. 9 Ch. 551; *Loftus* v. *Swift*, 2 Sch. & L. 657.

(*x*) *Rider* v. *Jones*, 2 Y. & C. C. C. 335.

(*y*) *Detillin* v. *Gale*, 7 Ves. 586.

(*z*) *Binnington* v. *Harwood*, T. & R. 477; *Wilson* v. *Metcalfe*, 1 Russ. 530; *Quarrell* v. *Beckford*, 1 Madd. 269; *Barlow* v. *Gains*, 23 Beav. 239, 244; *Montgomery* v. *Calland*, 14 Sim. 79.

(*a*) *Price* v. *M'Beth*, 10 Jur. N. S. 579; *Gilbert* v. *Golding*, 2 Anst. 442. But see *Stone* v. *Lickorish*, (1891) 2 Ch. 363.

(*b*) *Ashworth* v. *Lord*, 36 Ch. D. 545, 551.

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due has been paid or does not exceed a tender, may be added to the decree at the hearing (*c*).

Set off of costs.

In some cases the costs are set off against the amount due to the mortgagee (*d*).

A claim that the mortgagee should be fixed with the costs should be included in the original inquiry, for the Court will not attend afterwards to evidence upon the subject (*e*).

When mortgagor may lose his right to costs.

But a mortgagor will lose his right to costs which he claims against the mortgagee, if, upon an action for redemption and containing charges of oppression and misconduct, and praying that he may be fixed with the costs of the suit, the mortgagor consents to an immediate decree for an account reserving costs, but without making the special circumstances of the case a part of the reference to chambers (*f*).

ii.—Costs of and incident to Actions for Foreclosure or Redemption.—The mortgagee is entitled to the costs originally falling on himself of and incident to an action for redemption or foreclosure. This includes the costs of his trustee made defendant (*g*); also the costs relating to another estate which the mortgagor has wrongfully included in his suit for redemption (*h*); and where two mortgagees are entitled in different proportions to the mortgage money, and one of the mortgagees is made a defendant, the costs of the latter must be paid (*i*).

Costs of persons claiming under mortgagee.

The mortgagor, on redemption, must also pay the costs of all persons claiming under the mortgagee, although the mortgage be carried by the mortgagee into settlement (*k*). And, upon this principle, in cases not falling within the Conveyancing Act, 1881 (*l*), he must pay the costs of the proceedings in chambers, and of the petition, to establish the devisee or infant heir of the mortgagee a trustee within the Trustee Acts (*m*), and the costs

(*c*) *Hosken* v. *Sincock*, 11 Jur. N. S. 477.

(*d*) *Wheaton* v. *Graham*, 24 Beav. 483; *Cowdry* v. *Day*, 1 Giff. 316; *Banks* v. *Whittall*, 1 De G. & S. 541; *West* v. *Jones*, 1 Sim. N. S. 218.

(*e*) *Dunstan* v. *Patterson*, 2 Ph. 341; *Wright* v. *Jones*, C. P. Coop. 493.

(*f*) *Dunstan* v. *Patterson*, 2 Ph. 341.

(*g*) *Browne* v. *Lockhart*, 10 Sim. 420, 426.

(*h*) *Batchelor* v. *Middleton*, 6 Ha. 75, 86.

(*i*) *Davenport* v. *James*, 7 Ha. 249.

(*k*) *Wetherell* v. *Collins*, 3 Madd. 255; *Bartle* v. *Wilkin*, 8 Sim. 298; *Burden* v. *Oldaker*, 1 Coll. 105; *Day* v. *Kelland*, 82 L. T. 142.

(*l*) 44 & 45 Vict. c. 41, s. 30, *ante*, p. 866.

(*m*) *Exp. Ommaney*, 10 Sim. 228; *King* v. *Smith*, 6 Ha. 473.

of the conveyance from such devisee or heir, or a vesting order in lieu thereof (*n*), and of a vesting order made necessary by an absconding mortgagee (*o*).

Costs of assignment of mortgage.

So the additional costs caused by an assignment by a second mortgagee of his mortgage, pending a foreclosure suit by the first mortgagee, will fall on the estate; though otherwise as to the extra costs in such suit occasioned by the assignment by the first mortgagee after institution of the suit, such assignment being of such a nature as to make the suit wholly inefficient (*p*).

Judgment creditor of mortgagee.

So, also, a judgment creditor of a mortgagee claiming a sale of the mortgaged property stands in the place of a mortgagee in respect of the right to costs (*q*).

Paramount title.

A mortgagee will not be allowed his costs against a party claiming by a paramount title (*r*).

Redemption of two properties.

If a mortgagor, in a redemption suit instituted to redeem two distinct mortgages upon different estates which have become vested in the same person, is held entitled to redeem one only, the mortgagee will be allowed to throw the whole of his costs of suit upon the latter estate, though the mortgagor sue *in formâ pauperis* (*s*).

Foreclosure of two properties.

Where a mortgagee brings an action to foreclose two mortgages of two separate properties, if the mortgages are not liable to be consolidated (*t*), the mortgagee's costs will not be charged as a whole against each estate, but must be rateably apportioned between the two mortgages (*u*).

Apportionment of costs between several funds.

Where a *mesne* mortgagee whose mortgage comprises all the lands, parts of which are charged with prior and subsequent mortgages, has brought his action for redemption and foreclosure, and a decree for sale and apportionment of the proceeds of the whole of the lands has been made with consent of all parties, the costs of each mortgagee will be paid out of the sum apportioned in respect of the estate charged with his mortgage, and not out of the general fund (*x*).

(*n*) *Exp. Cant*, 10 Ves. 554. See the Trustee Act, 1893, *post*, Chap. LXI. Sect. II. (iii).

(*o*) *Webb* v. *Crosse*, (1912) 1 Ch. 323.

(*p*) *Coles* v. *Forrest*, 10 Beav. 552.

(*q*) *Merriman* v. *Bonnor*, 10 Jur. N. S. 534; *Ellison* v. *Wright*, 3 Russ. 458.

(*r*) *Shackleton* v. *Shackleton*, 2 S. & St. 242.

(*s*) *Batchelor* v. *Middleton*, 6 Ha. 86.

(*t*) 44 & 45 Vict. c. 41, s. 17, *ante*, p. 892.

(*u*) *De Caux* v. *Skipper*, 31 Ch. D. 635, C. A.

(*x*) *Lee* v. *Lockhart*, 10 Beav. 320.

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Costs of administration.

The mortgagee will be allowed the costs of taking out administration to the mortgagor, as principal creditor (*y*), or to an incumbrancer under the will of the mortgagor, as a necessary party to foreclosure (*z*).

Costs of adjournment to judge.

A mortgagee was held entitled to the costs of an adjournment to the judge, where the point raised was arguable, though it was decided against him (*a*).

Costs of appeal by mortgagee.

So where a mortgagee appeals from the decision of the Court below, he will be allowed to add his costs of the appeal to his mortgage charge if his appeal is successful (*b*).

Where only one set of costs is allowed.

The owner of a share of an estate and his incumbrancers have but one set of costs, which are received by the first incumbrancer (*c*). And where a solicitor appears for several persons interested in a mortgage, he can only charge for one copy of the mortgage deed (*d*).

Costs in debenture holder's action.

Where, in a suit by a debenture holder on behalf of himself and other debenture holders against the company and the trustees of a deed to recover payment of the debentures, a receiver had been appointed, and ultimately the property was sold for an amount insufficient to pay the principal and interest of the debentures, and costs, charges and expenses, it was held that the proceeds of sale must be applied in the following order:—first, in payment of the plaintiff's costs of the realization of the property, including costs of an abortive attempt to sell; next, in payment of the balance due to the receiver for the remuneration and expenses, including his costs of the suit; then, in payment of the costs of the trustees of the deed; then, in payment of the plaintiff's costs of the suit; and the balance to be applied in payment of the amount due on the debentures (*e*).

Where a debenture holder brought an action on behalf of himself and all other debenture holders to enforce the security and settle priorities, and it was found that the debentures ranked in order of date, so that there would be no money to satisfy the plaintiff's debenture, it was held that he was entitled

(*y*) *Ramsden* v. *Langley*, 2 Vern. 536; *Lomax* v. *Hide*, 2 Vern. 185.
(*z*) *Hunt* v. *Fownes*, 9 Ves. 70.
(*a*) *Re Watts, Smith* v. *Watts*, 22 Ch. D. 1, C. A.
(*b*) *Addison* v. *Cox*, L. R. 8 Ch. 76. See *Henry* v. *Ryan*, 1 Knapp, 388.
(*c*) *Remnant* v. *Hood*, 27 Beav. 613; *Equitable Life Assurance Co.* v. *Fuller*, 7 Jur. N. S. 307; *Ward* v. *Yates*, 1 Dr. & S. 80.
(*d*) *Re Wade*, 17 Ch. D. 348.
(*e*) *Batten* v. *Wedgwood Coal and Iron Co.*, 28 Ch. D. 317; *Re London United Breweries*, (1907) 2 Ch. 511.

to his general costs, the action being for the benefit of all the debenture holders (*f*).

A plaintiff in a debenture holder's action is only entitled to party and party costs out of the property realized, where it is sufficient to pay all charges upon it and there is a surplus (*g*), but he is entitled to solicitor and client costs if the assets are insufficient for the payment of the debentures in full (*h*).

Where debentures are secured by a trust deed, the trustees are proper parties to a debenture holder's action and are entitled to a full set of costs (*i*).

But second debenture holders who are made defendants to a first debenture holder's action are not entitled to costs where the assets are insufficient for payment of the first debentures (*k*).

Costs of disclaiming defendants.

With respect to the costs in a foreclosure suit of a defendant who disclaims, the rules are established (*l*) that if such defendant shows that he never had and never claimed any interest, or, having an interest, that he had disclaimed, or offered to disclaim, before the institution of the suit, he is entitled to his costs (*m*). But if, having an interest, he neither disclaims nor offers to disclaim till he puts in his defence, he is not entitled (*n*). These rules prevail, though the plaintiff never applied to the defendant to disclaim prior to the institution of the suit.

Inquiry as to claims.

The prudent course, however, for a mortgagee before making an incumbrancer a party, is to inquire of him whether he claims any interest, and so to give him an opportunity of disclaiming before any costs are incurred (*o*).

Rule where defendant is properly made a party.

Where, however, a person is properly made a party in the first instance, as having an interest in the mortgage property, the plaintiff is not obliged to make any application to him in

(*f*) *Carrick* v. *Wigan Tramways Co.*, W. N. (1893) 98. As to costs of second debenture holders, see *ante*, p. 1149.

(*g*) *Queen's Hotel, Cardiff, Co.*, (1900) 1 Ch. 792.

(*h*) *New Zealand Midland Ry.*, (1901) 2 Ch. 357, C. A.

(*i*) *Mortgage Ins. Corp.* v. *Canadian, &c. Co.*, (1901) 2 Ch. 377.

(*k*) *Re Clayton Engineering Co.*, W. N. (1904) 28; 90 L. T. 283.

(*l*) *Ford* v. *Earl of Chesterfield*, 16 Beav. 516.

(*m*) *Teed* v. *Carruthers*, 2 Y. & C. C. C. 31; *Long* v. *Storie*, 9 Ha. 542; *Broughton* v. *Key*, W. N. (1882) 3; *Earl of Cork* v. *Russell*, L. R. 13 Eq. 210.

(*n*) *Cash* v. *Belcher*, 1 Ha. 310; *Appleby* v. *Duke*, 1 Ph. 272; *Grigg* v. *Sturgis*, 5 Ha. 93; *Gabriel* v. *Sturgis*, 5 Ha. 97; *Ohrley* v. *Jenkins*, 1 De G. & S. 543.

(*o*) *Hiorns* v. *Holtom*, 16 Beav. 259; *Gurney* v. *Jackson*, 1 Sm. & G. 97; *Day* v. *Gudgeon*, 2 Ch. D. 209.

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order to ascertain whether he claims an interest or not, but is entitled to a disclaimer from him if he claims no interest in the subject-matter of the suit (*p*).

Disclaiming defendant putting in defence.

As a general rule, a defendant who puts in a defence instead of a simple disclaimer will not be allowed his costs (*q*).

So where an assignee of the mortgagee put in an answer in a foreclosure suit, stating that if he had been applied to he would have disclaimed or released his interest, he was not allowed his costs (*r*).

A trustee who had always refused to act being made a party to a foreclosure suit, appeared and put in an answer in which he disclaimed and stated that he never had claimed, setting out a correspondence which showed that he had always refused to act; he was allowed his full costs, on the ground that the bill might have stated circumstances showing that a simple disclaimer would have been sufficient (*s*).

Formal disclaimer necessary.

As a rule a devisee will not be entitled to his costs unless he has formally disclaimed or released his interest before suit (*t*), or put in a disclaimer after suit asking to be dismissed without costs (*u*).

What will amount to disclaimer.

Where an equitable mortgagee, being made a defendant to an action for foreclosure, wrote to the plaintiff's solicitor stating that he was willing to transfer his interest and disclaim, but did not execute any transfer, nor offer to be dismissed without costs, it was held that there was no sufficient disclaimer to entitle him to costs (*x*).

The rule has been relaxed in some cases though a defendant has not actually disclaimed. So where the party shows that the demand would have been satisfied had it been made before the commencement of the action, the Court will allow him his costs (*y*); or where, before action brought, he had consented to join in conveying the estate (*z*).

(*p*) *Maxwell* v. *Wightwick*, L. R. 3 Eq. 210. See *Tipping* v. *Power*, 1 Ha. 405; *Talbott* v. *Kemshead*, 4 K. & J. 93.

(*q*) *Bradley* v. *Borlase*, 7 W. R. 125. See *Clarke* v. *Toleman*, 42 L. J. Ch. 23; *Lewin* v. *Jones*, 53 L. J. Ch. 1011.

(*r*) *Ford* v. *White*, 16 Beav. 120. See *Lock* v. *Lomas*, 15 Jur. 162.

(*s*) *Benbow* v. *Davies*, 11 Beav. 369.

(*t*) *Furber* v. *Furber*, 30 Beav. 523. See *Gray* v. *Adamson*, 35 Beav. 383.

(*u*) *Davis* v. *Whitmore*, 28 Beav. 617. See *Maxwell* v. *Wightwick*, L. R. 3 Eq. 210; *Greene* v. *Foster*, 22 Ch. D. 566.

(*x*) *Roberts* v. *Hughes*, L. R. 6 Eq. 20.

(*y*) Per Wigram, V.-C., in *Gabriel* v. *Sturgis*, 5 Ha. 97, 101.

(*z*) *Thompson* v. *Kendal*, 9 Sim. 397.

It seems, however, that, as a general rule, an offer to disclaim will be sufficient; so that where a person who is made a defendant offers, immediately on being served, to disclaim, and to submit to dismissal of the action against him without costs, but is compelled to put in a defence and is brought to a hearing, he will be allowed all his costs subsequent to such offer (*a*).

Offer to disclaim before defence.

Where a defendant wrote to the plaintiff's solicitor offering to consent to a dismissal of the action without costs, and to execute a release at the plaintiff's expense, but the plaintiff brought the action to trial setting up a claim, which failed, against that defendant for delivery of certain deeds, it was held that the letter contained a proper offer to disclaim, and that the disclaiming defendant was entitled to his whole costs (*b*).

Where a defendant does not disclaim before action brought, an assignment subsequent to the action followed by a disclaimer will not entitle him to his costs (*c*).

It seems that the disclaimer, or offer to disclaim, need not expressly submit to dismissal of the action without costs (*d*). But if the disclaiming defendant appears to claim costs, they will not be allowed (*e*).

Submission to dismissal.

The general rule, that a person who has an interest at the time of the action brought, and is therefore properly made a party, will not be allowed his costs, unless he disclaims, or offers to disclaim, is enforced against defendants who are subsequent incumbrancers (*f*), and even against prior equitable incumbrancers, of whose incumbrances there was no notice (*g*), and against their respective trustees in bankruptcy and such trustee and devisees of the mortgagor (*h*).

General rule applies to puisne incumbrancers, trustees, &c.

iii.—**Extraordinary Costs, Charges, and Expenses.**—Where the mortgagee claims any extra costs or extraordinary expenses, over and above the costs of and properly incident to the suit, the decree must contain an inquiry as to costs, charges, and expenses, other than costs of suit (*i*), and a sufficient ground

Inquiry as to extra costs.

(*a*) *Talbott* v. *Kemshead*, 4 K. & J. 93; *Greene* v. *Foster*, 22 Ch. D. 566.

(*b*) *Day* v. *Gudgen*, 2 Ch. D. 209; *Greene* v. *Foster*, *sup.*

(*c*) *Lewin* v. *Jones*, 51 L. T. 59. See *Dillon* v. *Ashwin*, 12 W. R. 366.

(*d*) *Lock* v. *Lomas*, 15 Jur. 162.

(*e*) *Bradley* v. *Borlase*, 7 W. R. 125; *Maxwell* v. *Wightwick*, L. R. 3 Eq. 210.

(*f*) *Joyce* v. *De Moleyns*, 3 Dr. & War. 698, 701.

(*g*) *Gabriel* v. *Sturgis*, 5 Ha. 97.

(*h*) *Appleby* v. *Duke*, 1 Ph. 272; *Hughes* v. *Kelly*, 3 Dr. & War. 495; *Clarke* v. *Wilmot*, 1 Ph. 276; *Ohrley* v. *Jenkins*, 1 De G. & S. 543.

(*i*) *Merriman* v. *Bonner*, 10 Jur. N. S. 534; *Tipton Green Co.* v. *Tipton Moat Co.*, 7 Ch. D. 192.

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must be laid for such inquiry (*k*); and where such inquiry has been omitted, it will not be supplied on further consideration or on petition (*l*).

Just allowances.

All just allowances, however, are made without any direction in the decree (*m*). The costs of an action were included under the term "just allowances," especially as the costs of actions were covered by the terms of the deed (*n*).

Costs of negotiation, investigation of title, &c.

The mortgagee's costs of and incident to the negotiation of the loan, the investigation of the mortgagor's title, and the preparation and execution of the security, are usually deducted out of the mortgage money.

If this is not done, and if such costs remain unpaid when an action for foreclosure or redemption is brought, the mortgagee will not be entitled to payment of those costs as a condition for redemption by the mortgagor, or by a puisne incumbrancer (*o*). Such costs are a simple contract debt, and cannot be added by the mortgagee to his security as part of the costs, charges, and expenses properly incurred under or by virtue of his mortgages (*p*).

Where an action was brought to foreclose an equitable mortgage by deposit of deeds accompanied by a memorandum, whereby the mortgagor agreed to execute a legal mortgage of all his "estate and interest" in the premises comprised in the deeds, the following costs were allowed to the mortgagee:—Costs of correspondence with a surety who had given a promissory note for part of the debt; costs of correspondence with the mortgagor as to the legal mortgage which the mortgagor refused to execute, and costs of preparing the legal mortgage; but the Court refused to allow the costs of investigating the mortgagor's title on the ground that the contract was merely for a mortgage of such estate and interest as the mortgagor had (*q*).

It would seem, therefore, that the costs of preparing and executing a legal mortgage which are not paid at the time of

(*k*) *Merriman* v. *Bonner*, *sup.*; *Bolinbroke* v. *Hinde*, 25 Ch. D. 795.

(*l*) *Horlock* v. *Smith*, 1 Coll. 287, 298; *Barron* v. *Lancefield*, 17 Beav. 208.

(*m*) Ord. XXXIII. r. 8.

(*n*) *Blackford* v. *Davis*, L. R. 4 Ch. 304. And see *Wilkes* v. *Saunion*, 7 Ch. D. 188; *Rees* v. *Metropolitan Board of Works*, 14 Ch. D. 372; *Bolinbroke* v. *Hinde*, 25 Ch. D. 795.

(*o*) *Wales* v. *Carr*, (1902) 1 Ch. 860.

(*p*) *Ibid.*

(*q*) *National Provincial Bank of England* v. *Games*, 31 Ch. D. 582, C. A.

the completion of the mortgage cannot be charged against the property and added to the price of redemption (*r*), unless they are expressly stipulated for (*s*). But where there is an equitable mortgage containing an agreement to execute a legal mortgage, the costs of and incident to the preparation of a legal mortgage may be allowed, as being costs incurred for the protection or preservation of the mortgaged property (*t*).

If the mortgage goes off, it is clear that the mortgagee cannot maintain an action against the mortgagor for recovery of the costs of negotiating the loan or investigating the title (*u*).

Costs of extraneous matters not allowed.

A mortgagee will not be allowed costs incurred by him for matters not necessarily connected with the mortgage security. So, the Court disallowed the costs attending the preparation and execution of a deed executed by the mortgagee by way of declaration of trust to a person who supplied the money for the advance (*x*).

Perfecting equitable charge.

The costs of perfecting an equitable mortgage by conveyance or surrender fall on the mortgagor (*y*).

Remuneration for personal trouble.

A mortgagee cannot, as a general rule, charge for his personal trouble, even though there be a special stipulation to that effect (*z*).

Costs of receiver.

There may, however, be an agreement between the mortgagee and mortgagor for the appointment of a receiver which will be allowed (*a*); or, in the absence of such an agreement, the mortgagee may, if the mortgage is by deed, appoint a receiver under his statutory power so soon as his power of sale has become exerciseable, and the remuneration agreed upon or prescribed by statute will be allowed in account as part of the mortgagee's costs, charges, and expenses (*b*).

Mortgagee receiver.

But, if the mortgagee appoints himself as receiver, he will not generally be allowed any remuneration, and he will be liable to account as mortgagee in possession (*c*).

Solicitor-mortgagee.

A fortiori, the commission will be disallowed where the

(*r*) *Gregg* v. *Slater*, 22 Beav. 314; *Wales* v. *Carr*, (1902) 1 Ch. 860.
(*s*) As in *Blackford* v. *Davis*, L. R. 4 Ch. 304.
(*t*) *National Prov. Bank of England* v. *Games*, 31 Ch. D. 582, C. A.
(*u*) See *ante*, p. 62.
(*x*) *Re Martin*, 5 Bing. 160.
(*y*) *Price* v. *Bury*, L. R. 16 Eq. 153, n.
(*z*) See *post*, p. 1230.
(*a*) See *ante*, p. 947.
(*b*) *Chambers* v. *Goldwin*, 9 Ves. 254.
(*c*) *French* v. *Baron*, 2 Atk. 120; *Scott* v. *Brest*, 2 T. R. 238.

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mortgagee, being the mortgagor's solicitor, prepared the mortgage and inserted therein the stipulation for a commission (*d*).

On the same principle, mortgagees who became trustees of a creditor's deed, and appointed one of their number to receive the rents, were not allowed to add his commission to the mortgage debt (*e*).

Auctioneer mortgagee.

Also where a mortgagee with power of sale was member of a firm of auctioneers who sold for him, it was held that they were not entitled to commission (*f*), unless the sale was under the direction of the Court (*g*).

Custom of trade.

But under the custom of trade, an agreement by the mortgagor of ships for the mortgagee to make sales under the security at a rate exceeding the rate of brokerage is valid (*h*), and mortgagees of ships and cargoes selling under an order of the Court will be allowed the ordinary commission of brokers acting under its authority (*h*).

Sale with right of re-purchase.

Where also a mortgagee purchased the equity of redemption, reserving to the mortgagor a right of re-purchase within a limited time, to be barred if the profits in any half-year were not sufficient to pay the interest, in ascertaining the profits, the mortgagee was not allowed to charge commission (*i*). Similarly, a mortgagee in possession of the business of a newspaper was not allowed to charge credit prices for printing (*k*).

West India estates.

A mortgagee of a West India estate, whilst he is mortgagee out of possession, may stipulate for the consignments of the produce, and charge commission on the net produce as a compensation for his trouble (*l*). But without such a stipulation in the mortgage deed, the Court will not appoint him the consignee whilst he is out of possession (*m*). But when he is in possession he stands in precisely the same situation as a mortgagee in possession in England; and consequently, although, if he employ another person as consignee, commission may be charged, yet if he chooses to be consignee himself, he has no commission (*n*).

(*d*) *Eyre* v. *Hughes*, 2 Ch. D. 148. See *Comyns* v. *Comyns*, Ir. R. 5 Eq. 583.
(*e*) *Nicholson* v. *Tutin*, 3 K. & J. 159.
(*f*) *Mathison* v. *Clarke*, 3 Drew. 3; *Broad* v. *Selfe*, 9 Jur. N. S. 885.
(*g*) *Arnold* v. *Garner*, 2 Ph. 231.
(*h*) *Ibid.*
(*i*) *Ogden* v. *Battams*, 1 Jur. N. S. 791.
(*k*) *Robertson* v. *Norris*, 1 Giff. 428, 436.
(*l*) *Bunbury* v. *Winter*, 1 J. & W. 255; *Faulkner* v. *Daniel*, 3 Ha. 218.
(*m*) *Cox* v. *Champneys*, Jac. 576.
(*n*) *Leith* v. *Irvine*, 1 My. & K. 277; *Chambers* v. *Goldwin*, 9 Ves.

The rule, which prohibits payments or allowances to the mortgagee, is not affected by the repeal of the usury laws (*o*), and is still rigidly adhered to by the Courts with a view of preventing oppressive bargains (*p*).

Rule not affected by repeal of usury laws.

Upon the principle that a mortgagee cannot be allowed to charge for his personal trouble, it has till recently been a settled rule, that a solicitor-mortgagee could not charge profit-costs, whether he acted for himself alone (*q*) or for himself and a co-mortgagee (*r*).

Profit-costs of solicitor-mortgagee.

"Profit" by a solicitor is the amount of his costs less disbursements out of pocket, and no allowance can be made for general office expenses (*s*).

But now by the Mortgagees' Legal Costs Act, 1895 (*t*), it is enacted as follows:—

Charges, &c. where mortgage is made with solicitor.

Sect. 2.—"(1.) Any solicitor to whom, either alone or jointly with any other person, a mortgage is made, or the firm of which such solicitor is a member, shall be entitled to receive for all business transacted and acts done by such solicitor or firm in negotiating the loan, deducing and investigating the title to the property, and preparing and completing the mortgage, all such usual professional charges and remuneration as he or they would have been entitled to receive if such mortgage had been made to a person not a solicitor, and such person had retained and employed such solicitor or firm to transact such business and do such acts; and such charges and remuneration shall accordingly be recoverable from the mortgagor.

"(2.) This section applies only to mortgages made after the commencement of this Act."

Right of solicitor with whom mortgage is made to recover costs, &c.

Sect. 3.—"(1.) Any solicitor to or in whom either alone or jointly with any other person any mortgage is made or is vested by transfer or transmission, or the firm of which such solicitor is a member, shall be entitled to receive and recover from the person on whose behalf the same is done, or to charge against the security for all business transacted and acts done by such solicitor or firm subsequent and in relation to such mortgage, or to the security thereby created or the property therein comprised, all such usual

271. See *Forrest* v. *Elwes*, 2 Mer. 68; *Bertrand* v. *Davies*, 31 Beav. 429; *Sayers* v. *Whitfield*, 1 Knapp, 133.

(*o*) *Croft* v. *Graham*, 2 De G. & S. 155, 161; *Earl of Aylesford* v. *Morris*, L. R. 8 Ch. 484; *James* v. *Kerr*, 40 Ch. D. 449, 459; *Mainland* v. *Upjohn*, 41 Ch. D. 126, 138.

(*p*) *Broad* v. *Selfe*, 9 Jur. N. S. 885; *Barrett* v. *Hartley*, L. R. 2 Eq. 789; *Eyre* v. *Hughes*, 2 Ch. D. 148.

(*q*) *Field* v. *Hopkins*, 44 Ch. D. 524; *Eyre* v. *Wynn-Mackenzie*, (1894) 1 Ch. 218.

(*r*) *Re Doody, Fisher* v. *Doody*, (1893) 1 Ch. 129. See *Re Wallis, Exp. Lickorish*, 25 Q. B. D. 176; *Stone* v. *Lickorish*, (1891) 2 Ch. 363.

(*s*) *Re Gallard*, (1896) 1 Q. B. 68.

(*t*) 58 & 59 Vict. c. 25. This Act came into operation on the 6th of July, 1895.

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professional charges and remuneration as he or they would have been entitled to receive if such mortgage had been made to and had remained vested in a person not a solicitor, and such person had retained and employed such solicitor or firm to transact such business and do such acts; and accordingly no such mortgage shall be redeemed except upon payment of such charges and remuneration.

"(2.) This section applies to mortgages made and business transacted and acts done either before or after the commencement of this Act."

Definition of mortgage.

Sect. 4. "In this Act the expression 'mortgage' includes any charge on any property for securing money or money's worth."

Act not retrospective.

Sect. 3 was held not to apply retrospectively to cases where the costs had been disallowed and the time for appeal had expired (*u*), nor to a case where a foreclosure order had been made prior to the Act, though the taxation of the solicitor-mortgagee's costs took place under an order made after the Act had come into force (*x*).

A solicitor-mortgagee is entitled under the Act to the scale fee for negotiating a mortgage, though he is not in partnership and alone advances the mortgage money (*y*).

Costs of supporting or enforcing security.

A mortgagee will generally be allowed all costs and expenses reasonably and properly incurred by him in maintaining or defending his rights or in enforcing his security.

Costs of ejectment.

The mortgagee will be allowed the costs of all actions of ejectment or for the recovery of land or otherwise properly incurred (*z*), including costs against a surety (*a*).

But an equitable mortgagee was not allowed the costs of an unsuccessful attempt to defend an action at law for the recovery of the premises (*b*).

Costs of action on covenant or bond.

In an action for foreclosure, the mortgagee will generally be allowed the costs of an action previously instituted by him in the King's Bench Division in which he has recovered judgment for the amount of the debt (*c*). This rule was questioned in one case (*d*); and in another case (*e*) a mortgagee's costs of an

(*u*) *Eyre* v. *Wynn-Mackenzie*, (1896) 1 Ch. 135, C. A.

(*x*) *Day* v. *Kelland*, (1900) 2 Ch. 745, C. A.

(*y*) *Re Norris*, (1902) 1 Ch. 741.

(*z*) *Merriman* v. *Bonner*, 10 Jur. N. S. 534; *Ellison* v. *Wright*, 3 Russ. 458. See *National Provincial Bank of England* v. *Games*, 31 Ch. D. 582, at p. 592, C. A.

(*a*) *Ellison* v. *Wright*, *sup.*; *Sachs* v. *Ashby*, 88 L. T. 393.

(*b*) *Dryden* v. *Frost*, 3 My. & Cr. 670.

(*c*) *National Provincial Bank of England* v. *Games*, 31 Ch. D. 582. See *Ellison* v. *Wright*, 3 Russ. 458; *Sachs* v. *Ashby*, 88 L. T. 393.

(*d*) *Merriman* v. *Bonner*, 10 Jur. N. S. 534.

(*e*) *Lewis* v. *John*, 9 Sim. 366.

action on a collateral bond given by the mortgagor were disallowed. But the rule appears to be now settled.

Costs of foreclosure allowed in redemption suit.

In a suit for redemption by a second mortgagee, the first mortgagee was allowed extra costs incurred by him in a suit for foreclosing the mortgagor (*f*).

Costs of stop order.

The mortgagee of a fund in Court is entitled to the costs of obtaining a stop order, at least if he had authority under the mortgage deed to obtain the order (and it would seem to be the same if otherwise); though such expenses are not allowed by the taxing master under the common order to tax the costs of the mortgagee, but must be specially mentioned in the order for taxation (*g*).

In practice, questions of this kind are usually precluded by the expense of obtaining a stop order being retained out of the loan.

Costs of defending actions.

A mortgagee will not be allowed the costs of appearing in and defending an action instituted between persons claiming an interest in the equity of redemption, but in which his interest as mortgagee is not affected (*h*).

Costs of unnecessary actions.

Nor will the costs be allowed of an unsuccessful suit by the mortgagee for specific performance when selling under his power of sale, which fails from the misdescription of the premises in his contract (*i*); nor the costs of defending his title to the mortgage debt against a third party (*k*); nor the costs of an unsuccessful defence to a suit against the mortgagee by the tenant for life to set aside the mortgage as against the remainderman (*l*).

Costs of surety.

The mortgagor cannot get back the property until he has paid his surety all costs properly incurred by his surety (*l*), or the costs of a judgment obtained by the mortgagee against the surety (*m*).

Surety defending action.

A surety cannot charge, as against a puisne mortgagee, the costs of defending an action by the mortgagee whose security he has paid off, inasmuch as such costs are only a simple contract debt (*n*).

(*f*) *Merriman* v. *Bonner, sup.*; *Lomax* v. *Hide*, 2 Vern. 185.

(*g*) *Waddilove* v. *Taylor*, 6 Ha. 307. See *Grimsby* v. *Webster*, 8 W. R. 725.

(*h*) *Doe* d. *Pearson* v. *Roe*, 6 Bing. 447.

(*i*) *Pears* v. *Ceeley*, 15 Beav. 209.

(*k*) *Parker* v. *Watkins*, 2 John. 133.

(*l*) *Ibid.*; *Re Keane*, L. R. 12 Eq. 115, 123.

(*m*) *Sachs* v. *Ashby*, 88 L. T. 393.

(*n*) *South* v. *Bloxham*, 2 H. & M. 457.

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General expenses of maintaining security.

The mortgagee (*o*) will be allowed all costs necessarily incurred by him in maintaining the title to the estate (*p*), renewing leases (*q*), or in establishing his security (*r*), in preserving the estate by payment of head rent (*s*), or for the redemption of land tax (*t*), or in perfecting his title, as by payment of the fines and fees upon admission to copyholds, and the costs of procuring a necessary Act of Parliament (*u*), also fines in a building society mortgage (*x*), discounts on the renewal of bills of exchange secured by the mortgage (*y*), also the costs of his solicitor on paying off the mortgage and making out a list of deeds (*z*), and the costs of an order for the delivery of the title deeds out of chambers, where they have been deposited in a regular suit for the administration of the mortgagee's estate (*a*), will be allowed to his executors; but where the mortgagees were executors and engaged in an administration suit, and the mortgagor had no notice of the suit nor of their character of executors, and the title deeds were afterwards, in pursuance of an order in the suit, deposited in the Master's office, the costs of getting the deeds out of the office on redemption were fixed on the mortgagees (*b*).

Interest on proper expenses.

Interest is allowed on proper advances made by the mortgagee for the benefit or support of the estate and the security; thus interest has been allowed upon fines paid for the renewal of leaseholds (*c*), or premiums on life policies (*d*), or sums expended in support of the title (*e*); or in the redemption of land tax (*f*); on costs paid under an indemnity (*g*); and on interest

(*o*) As to what expenses of repairs, &c. will be allowed to a mortgagee in possession, see *post*, p. 1232.

(*p*) *Godfrey* v. *Watson*, 3 Atk. 518; *Langton* v. *Langton*, 7 De G. M. & G. 30; *Phéné* v. *Gillan*, 5 Ha. 1; *Sandon* v. *Hooper*, 6 Beav. 246.

(*q*) *Lacon* v. *Mertins*, 3 Atk. 4; *Manlove* v. *Bale*, 2 Vern. 84; *Woolley* v. *Drag*, 2 Anst. 551.

(*r*) *Pelly* v. *Wathen*, 1 De G. M. & G. 16.

(*s*) *Burrowes* v. *Molloy*, 2 J. & L. 521.

(*t*) *Knowles* v. *Chapman*, Seton (7th ed.), p. 1905.

(*u*) *Ledger* v. *Groome*, Seton (7th ed.), p. 1905.

(*x*) *Provident, &c. Soc.* v. *Greenhill*, 9 Ch. D. 122. See *Pilkington* v. *Baker*, W. N. (1877) 210; *Parker* v. *Butcher*, L. R. 3 Eq. 762.

(*y*) *Fenton* v. *Blackwood*, L. R. 5 P. C. 167.

(*z*) *Wakefield* v. *Newbon*, 8 Jur. 735.

(*a*) *Burden* v. *Oldaker*, 1 Coll. 105.

(*b*) *Reed* v. *Freer*, 13 L. J. Ch. 417.

(*c*) *Manlove* v. *Bale*, 2 Vern. 84; *Lacon* v. *Mertins*, 3 Atk. 4; *Woolley* v. *Drag*, 2 Anst. 551.

(*d*) *Bellamy* v. *Brickenden*, 2 J. & H. 137; *Hodgson* v. *Hodgson*, 2 Keen, 704.

(*e*) *Godfrey* v. *Watson*, 3 Atk. 518.

(*f*) *Knowles* v. *Chapman*, Seton (7th ed.), p. 1888.

(*g*) *Wainman* v. *Bowker*, 8 Beav. 363.

paid under a covenant to indemnify (*h*); but not on fines charged by a building society, unless there is an express agreement to that effect (*i*).

If the mortgagor elect to be foreclosed, the mortgagee has no remedy against him for expenses incurred in maintaining the property in mortgage, such as payment of calls on shares mortgaged, nor for legal liabilities attached to the property, but from the time the former elects to redeem, the mortgagee becomes a trustee for him, and as such is entitled to be indemnified against all such expenses and liabilities (*k*).

Interest on costs.

A mortgagee is not entitled to interest on his taxed costs, unless they are directed to be added to his security, in which case the costs will carry interest at the rate of 4 per cent. per annum from the date of the taxing master's certificate, not from the date of the judgment (*l*).

Preserving fund for benefit of all incumbrancers.

Where a puisne incumbrancer takes proceedings which have the effect of securing a fund for the benefit of all the incumbrancers, his costs of such proceedings will be first paid out of the fund in priority to the charges of the other incumbrancers, the costs of such incumbrancers being added to their securities according to their respective priorities (*m*).

Costs of insurance.

Questions often arise whether the mortgagee is entitled to insurance premiums as part of his expenses.

Premiums of fire insurance paid by the mortgagee, when the mortgagor is under no contract to insure, will not be allowed to the mortgagee whether in possession or not; for the mortgagee, insuring for his own benefit and not being liable to account for the insurance money, cannot charge the mortgage estate (*n*). But when insurance was authorized, premiums were allowed to the mortgagee, although he had insured in a mode different from the terms of the deed, but as nearly conformable thereto as circumstances would admit (*o*).

(*h*) *Executors of Fergus* v. *Gore*, 1 Sch. & L. 107.

(*i*) *Sup.* n. (*x*).

(*k*) *Phéné* v. *Gillan*, 5 Ha. 1; *Wroughton* v. *Turtle*, 11 M. & W. 561; *Lawrance* v. *Boston*, 7 Exch. 28; *Langton* v. *Langton*, 7 De G. M. & G. 30.

(*l*) *Eardley* v. *Knight*, 41 Ch. D. 537, C. A. See *Lippard* v. *Ricketts*, L. R. 14 Eq. 291.

(*m*) *Ford* v. *Earl of Chesterfield*, 21 Beav. 426. See *Wright* v. *Kirby*, 23 Beav. 463; *Batten, Proffitt, and Scott* v. *Dartmouth Harbour Commissioners*, 45 Ch. D. 612.

(*n*) *Dobson* v. *Land*, 4 De G. & S. 575; *Bellamy* v. *Brickenden*, 2 J. & H. 137; *Hodgson* v. *Hodgson*, 2 Keen, 704; *Brooke* v. *Stone*, 34 L. J. Ch. 251. But see 14 Jur. pt. 2, p. 221.

(*o*) *Dobson* v. *Land*, *sup.*

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Even where there is a covenant to insure by the mortgagor, premiums paid by the mortgagee insuring without a power will not be allowed as against puisne incumbrancers, as the sum secured prior to their charge ought not, in the absence of express stipulation, to be increased as against them (*p*).

Notwithstanding these authorities, fire insurance premiums have been allowed under "just allowances" (*q*), since as a covenant to insure runs with the land, and is a covenant affecting the thing demised or mortgaged (*r*), a mortgagee's insurance on buildings would always enure for the benefit of the estate, and consequently he ought, as against the mortgagor, to be allowed the premiums in all cases where there is a covenant by the mortgagor to insure (*s*).

Conv. Act, 1881.

The decisions above referred to are also subject to the Conveyancing Act, 1881 (*t*), under which a mortgagee has the power (unless negatived or limited by express declaration in the security), after any omission by the owner, to insure the premises, and add the premiums with interest to his security.

Premiums.

Premiums of life insurance due to an insurance office (being mortgagees), which the mortgagor has agreed but failed to pay, will be allowed the mortgagees (*n*), if the policy has actually been effected by the society in its own office (*x*); but, without a covenant, the amount paid cannot be recovered in action, although the amount may be added to the mortgage debt (*y*).

Mortgagees of a policy of life assurance will be allowed sums paid for premiums with interest at 4 per cent., and from the death of the tenant for life at 5 per cent. (*z*), for the six years before the certificate (*a*).

Costs of realizing security.

A mortgagee will generally be entitled to his costs of attempts to realize his security by the proper exercise of his powers and remedies, though such attempts prove ineffectual.

Costs of abortive sale.

Where, in an action for foreclosure brought by a first mortgagee, the second mortgagee paid a sum of money into Court

(*p*) *Brooke* v. *Stone*, *sup.*

(*q*) *Scholefield* v. *Lockwood*, 11 W. R. 555, reversed on other grounds, 9 Jur. N. S. 738, 1258.

(*r*) *Vernon* v. *Smith*, 5 B. & Ald. 1.

(*s*) Dav. Conv. (4th ed.) vol. ii. pt. 2, p. 57. See *ante*, p. 147.

(*t*) Sect. 19 (i), (ii), sect. 23 (2). And see *ante*, p. 144, where these sub-sections are fully set out.

(*u*) *Earl Fitzwilliam* v. *Price*, 4 Jur. N. S. 889; *Brown* v. *Price*, 4 Jur. N. S. 882; *Scholefield* v. *Lockwood*, 9 Jur. N. S. 738.

(*x*) *Grey* v. *Ellison*, 1 Giff. 438.

(*y*) *Brown* v. *Price*, *sup.*

(*z*) *Gill* v. *Downing*, L. R. 17 Eq. 316.

(*a*) *Bellamy* v. *Brickenden*, 2 J. & H. 137.

in order to obtain an order for sale in lieu of foreclosure, it was held that the money was applicable to indemnify the mortgagee for his expenses of an abortive attempt to sell (*b*).

The costs of an abortive sale under the mortgage have been allowed without special order (*c*), even in a case where the sale went off from the dishonour of a bidder's cheque accepted by the auctioneer without inquiry as to his stability (*d*).

Costs of leave for mortgagee to bid.

But a mortgagee will not be allowed the costs of his application for leave to bid at the sale in bankruptcy of the mortgaged property unless the trustee consents (*e*).

Costs of notice to tenants.

In the case of notices to tenants to pay rent to a mortgagee going into possession, the invariable practice is to allow 1*s*. per folio for settling the first notice and 4*d*. a folio for all copies and for filling up subsequent notices to other tenants (*f*).

Notice to pay off.

The mortgagee's costs of notice to pay off the mortgage are as a matter of practice usually disallowed as against the mortgagor, though on principle there seems to be no reason why they should not be allowed as costs properly incurred by the mortgagee.

Section V.

Accounts against Mortgagees in Possession.

Usual order for account by mortgagee in possession.

i.—Mode of taking the Accounts generally.—Where a mortgagee has entered into possession (*g*), whether the action be brought by the mortgagor for redemption, or by the mortgagee for foreclosure, the usual order of the Court is that an account shall be taken of the rents and profits of the mortgaged hereditaments received by the mortgagee, or by any other person or persons for his use, or which, without his wilful default, might have been so received, and that the amount found due on the footing of such account be deducted from the amount found due to the mortgagee under his mortgage (*h*).

(*b*) *Corsellis* v. *Patman*, L. R. 4 Eq. 156.

(*c*) *Webster* v. *Patteson*, W. N. (1882) 10.

(*d*) *Farrer* v. *Lacey, Hartland & Co.*, 31 Ch. D. 42.

(*e*) *Exp. Williams*, 1 D. & C. 489; but see *Exp. Berkeley*, 4 D. & C. 572.

(*f*) *Re Tweedie's Taxation*, W. N. (1908) 257.

(*g*) The liabilities of a mortgagee in possession generally have been already considered *ante*, pp. 827 *et seq.*

(*h*) See Seton (7th ed.), 1826, 1887, 1897. See also *Brandon* v. *Brandon*, 10 W. R. 287.

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Mode of taking account.

The mortgagee is subject to an account from the time he takes possession. The usual mode of taking accounts against the mortgagee in possession is to set the total amount of rents and profits received by, or found to be chargeable to, him against the whole amount due upon the mortgage debt, viz., in discharge successively of the interest of the mortgage debt, and of money advanced for costs and improvements, and then of the principal of the same moneys (*i*).

Interest in arrear and subsequent sale.

Although interest is in arrear when possession is taken, if there has been a sale of part of the premises, the surplus proceeds of the sale, after payment of interest and costs, are applicable in discharge of an equivalent amount of the principal, and the accounts are continued in the ordinary course, but on the footing of the diminished principal (*k*).

But it is not the practice in taking the account against a mortgagee in possession who has sold a portion of the mortgaged property, that a rest should be taken of the rents and profits as well as of the principal and interest (*l*).

Accounts vexatiously required.

Where the debt far exceeds the value of the property, and the accounts are useless, the mortgagor is still entitled to the accounts; but, that the mortgagee may fix him with the expense of the accounts if vexatiously asked, the order must be prefaced that the accounts are given at the request of the mortgagor (*m*).

Wilful default.

A decree for wilful default is ordered against a mortgagee in possession, although there is no charge in the pleadings or proof at the trial (*n*): and this is said to be the only instance in which the Court directs an account in this form without a special case (*o*), although a purchaser, whose purchase has been set aside and ordered to stand as a security, is within the rule (*p*).

A decree for wilful default extends to the proceeds of sale; but no question can be raised thereunder as to the validity of sale or the adequacy of price (*q*).

(*i*) *Webb* v. *Rorke*, 2 Sch. & L. 661.

(*k*) *Thompson* v. *Hudson*, L. R. 10 Eq. 497. See *Ainsworth* v. *Wilding*, *inf.*

(*l*) *Ainsworth* v. *Wilding*, (1905) 1 Ch. 435, *post*, p. 1236.

(*m*) *Taylor* v. *Mostyn*, 25 Ch. D. 48, C. A.

(*n*) *Mayer* v. *Murray*, 8 Ch. D. 424; explaining *Job* v. *Job*, 6 Ch. D. 562. See also *Williams* v. *Price*, 1 S. & St. 581.

(*o*) *Lord Kensington* v. *Bouverie*, 7 De G. M. & G. 134, 156.

(*p*) *Adams* v. *Sworder*, 2 De G. J. & S. 44.

(*q*) *Mayer* v. *Murray*, 8 Ch. D. 424.

To make out a case of wilful default it is essential that the mortgagee should have been in possession as mortgagee and in no other character (*r*). He is liable for the receipts of his agents (*s*) or lessees (*t*) or sub-lessees (*u*), and for allowing the property to be occupied without payment of rent (*x*) or for additional rent received by reason of his letting the premises with a restrictive covenant, but not for a mere collateral advantage (*y*).

Liability of judgment creditor.

A judgment creditor in possession under an *elegit* is not, it seems, accountable for wilful default as between himself and other incumbrancers in respect of rents which he has permitted the owner to receive before any proceedings have been taken (*z*).

Whether in point of fact the mortgagee has been guilty of wilful default is a matter of inquiry on taking the account (*a*).

Account of rents and profits.

ii.—Account of Moneys received by Mortgagee.—A mortgagee in possession must account for the full amount of the rents and profits received by him or by his agent for his use (*b*).

The mortgagee must set out full and particular accounts of rents and profits received by him as mortgagee in possession (*c*). So, where in a redemption action the mortgagees brought in an account purporting to show their receipts in respect of the rents and profits of the mortgaged property, but which in fact only showed a lump sum received by them from their agent then deceased, it was held that the mortgagees were bound to set out a further account setting out full particulars of the amounts received by the agent (*d*).

Rents, &c. received after decree.

Any rents or profits received by the mortgagee subsequent to the decree must be brought into account, although the decree does not expressly extend to future rents and profits (*e*). Where a mortgagee receives rents after the account has been taken, he

(*r*) *Parkinson* v. *Hanbury*, L. R. 2 H. L. 1; *Ward* v. *Carttar*, 10 Eq. 29.
(*s*) *Brandon* v. *B.*, 10 W. R. 287.
(*t*) *Noyes* v. *Pollock*, 30 Ch. D. 336.
(*u*) *Taylor* v. *Mostyn*, 33 Ch. D. 226.
(*x*) *Ibid.*
(*y*) *White* v. *City of London Brewery*, *inf.* p. 1228.
(*z*) *Holton* v. *Lloyd*, 1 Moll. 30; *M'Donnell* v. *Walshe*, 2 Dr. & War. 252; *O'Brien* v. *Mahon*, 2 Dr. & War. 306.
(*a*) *Noyes* v. *Pollock*, 30 Ch. D. 336, at p. 342.
(*b*) *Moroney* v. *O'Dea*, 1 Ba. & Be. 118; *Lord Trimleston* v. *Hamill*, 1 Ba. & Be. 377, 385.
(*c*) *Elmer* v. *Creasy*, L. R. 9 Ch. 69.
(*d*) *Noyes* v. *Pollock*, 30 Ch. D. 336, C. A.
(*e*) *Lord Penrhyn* v. *Hughes*, 5 Ves. 99, 106.

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must account on affidavit for the amount up to the time when the matter is finally settled (*f*).

At what rate mortgagee is chargeable with rents.

A mortgagee who enters into receipt of the rents, accounts for rents according to the rate which has been reserved, and the rate at which the premises were let when he took possession will be taken to be the rate at which they were let during the whole time of his possession, unless the contrary is shown (*g*); and where a lease by the mortgagor to the mortgagee is set aside, the mortgagee will not be charged with more than the rent reserved in the lease, unless it is proved that a higher rent could have been obtained (*h*); and the rate reserved will be continued until the first payment after action brought, from which time a fair rent will be fixed by the Court (*i*); and generally the mortgagee cannot usually be charged with more than he has received, or according to the actual value of the land, unless it can be proved that, but for his gross default, mismanagement, or fraud, he might have received more (*k*). In taking the account, if the mortgagor prove the estate to have been let at a certain rent at any time during the mortgagee's possession, the onus will be thrown on the mortgagee to show that such was not the rent during the whole period of his possession (*l*).

Restrictive lease by mortgagee in possession.

Where mortgagees in possession, who were brewers, let the premises subject to a restrictive covenant by the tenant that he should take his supply of beer exclusively from them, it was held that the mortgagees must account for such additional rent as would have been receivable for the premises if there had been no restriction, but not for the profit made by the mortgagees by sale of beer to the tenant (*m*).

When an occupation rent is chargeable.

A mortgagee in actual occupation of the mortgaged property is liable to an occupation rent computed upon its full value (*n*); but a mortgagee will not be charged an increased occupation rent by reason of the value of the property having been increased by lasting improvements made by him, unless the expenses of such improvements are allowed to him (*o*). It

(*f*) *Oxenham* v. *Ellis*, 18 Beav. 593.
(*g*) *Blacklock* v. *Barnes*, Sel. Ca. in Ch. 53; *Lord Trimleston* v. *Hamill*, 1 Ba. & Be. 377, 385.
(*h*) *Gubbins* v. *Creed*, 2 Sch. & L. 214.
(*i*) *Webb* v. *Rorke*, 2 Sch. & L. 661.
(*k*) *Wragg* v. *Denham*, 2 Y. & C. Ex. 117.
(*l*) *Blacklock* v. *Barnes*, Sel. Ca. in Ch. 53.
(*m*) *White* v. *City of London Brewery Co.*, 42 Ch. D. 237, C. A.
(*n*) *Lord Trimleston* v. *Hamill*, 1 Ba. & Be. 377, 385.
(*o*) *Bright* v. *Campbell*, 54 L. J.

seems that the Court will not in a redemption suit direct the master to charge the defendant with an occupation rent unless the plaintiff alleges that the defendant has been in the actual occupation of the premises. A mere allegation of possession and receipt of the rents and profits by the defendant is not sufficient (*p*). And where the mortgage security consists of a lease granted to the mortgagee at a fair rent, to be retained by him in payment of his debt, the profits will be accounted for on the footing of that rent (*q*).

Allowing purchaser to enter into possession before completion.

Where a mortgagee who had taken possession sold the mortgaged lands under his power, and by arrangement with the purchaser, allowed him to go into possession four months before the day appointed for completion, but did not require him to pay any rent, it was held that the mortgagee was not chargeable with an occupation rent for the period during which the purchaser had been in possession before completion (*r*); but Cotton, L.J., in that case suggested that, if the mortgagee had acted unreasonably, he might have been chargeable on the ground of wilful default (*s*).

Accounts of proceeds of sale by mortgagee.

A mortgagor who is precluded from asking for redemption by reason of a sale by a mortgagee who has been in possession may bring an action for an account of rents and profits received, or which ought to have been received, by the mortgagee while in possession, as well as of the proceeds of sale (*t*).

Accounts as against annuitant in possession.

A grantor of an annuity cannot maintain an action for an account of the rents and profits received by the annuitant, under a demise for securing the annuity, without an offer to redeem on the terms contained in the deeds, or on equitable terms to be settled by the Court (*u*).

iii.—Allowances to Mortgagee for Outgoings.—A mortgagee in possession is entitled, in bringing in his accounts, to credit himself with payments representing outgoings incident to his possession as mortgagee; and a proviso in the mortgage deed limiting the total amount recoverable thereunder will not extend to such outgoings (*x*).

Ch. 1077, C. A. As to allowances for improvements, see *post*, p. 1232.

(*p*) *Trulock* v. *Roby*, 2 Ph. 395; *Shepard* v. *Jones*, 21 Ch. D. 469, C. A.

(*q*) *Moroney* v. *O'Dea*, 1 Ba. & Be. 109.

(*r*) *Shepard* v. *Jones*, 21 Ch. D. 469, C. A.

(*s*) *Ibid.* at p. 483.

(*t*) *Shepard* v. *Jones*, 21 Ch. D. 469, C. A.

(*u*) *Knebell* v. *White*, 2 Y. & C. Ex. 15.

(*x*) *White* v. *City of London Brewery Co.*, 42 Ch. D. 237, C. A.

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Where a mortgagee has entered into possession, though he is not entitled to any personal benefit for himself beyond the interest (*y*), and therefore will not be allowed for his trouble in receiving the rents of the estate himself (*z*), yet, if the collection of the rents be troublesome, he may appoint an agent or bailiff to collect them at the expense of the estate (*a*); and it makes no difference in this respect that the estate is vested by way of mortgage not in himself, but in a trustee for him (*b*). Commission at five per cent. paid to agents for collecting rents has been allowed (*c*). An improper allowance of commission is a ground to surcharge and falsify (*d*).

Mortgagee may appoint bailiff or agent.

Allowance for compensation to tenants.

A mortgagee in possession is entitled to be allowed, even after account settled, for crops, manure, &c., for which he remains liable to pay to an outgoing tenant of the mortgaged property according to the custom of the country (*e*). The same rule would, no doubt, apply to compensation which a mortgagee might be called on to pay under the Agricultural Holdings Acts, 1883 to 1900 (*f*), and the Tenants Compensation Act, 1890.

Expenses of working mines.

If a mortgagee is specially authorized to work mines, he will be allowed the expenses incurred in doing so, with interest (*g*). And a mortgage of a colliery *primâ facie* passes the right to work the mines (*h*).

A mortgagee in possession of open mines is not bound to advance more money on them than a prudent owner would on his own estate; and he will not be removed from management of them, except upon clear proof of gross mismanagement (*i*).

Opening mines.

A mortgagee will not be allowed his expenses in opening mines or quarries, but must speculate at his own hazard; he will be charged with the receipts, but not allowed his expenses

(*y*) *Ante*, p. 1217.

(*z*) *Bonithon* v. *Hockmore*, 1 Vern. 316; *French* v. *Baron*, 2 Atk. 120. See *Chambers* v. *Goldwin*, 9 Ves. 271; *Eyre* v. *Hughes*, 2 Ch. D. 148; *Union Bank of London* v. *Ingram*, 16 Ch. D. 53; *Kavanagh* v. *Working Men's Benefit Building Soc.*, (1896) 1 Ir. R. 56, C. A.

(*a*) *Godfrey* v. *Watson*, 3 Atk. 518; *Union Bank of London* v. *Ingram*, *sup.*

(*b*) *Davis* v. *Dendy*, 3 Madd. 170.

(*c*) *Stains* v. *Banks*, 9 Jur. N. S. 1049, reversed on the question whether agents' commission shall be allowed, see 16 Ch. D. at p. 57.

(*d*) *Langstaffe* v. *Fenwick*, 10 Ves. 404. See *ante*, p. 1169.

(*e*) *Oxenham* v. *Ellis*, 18 Beav. 593.

(*f*) 46 & 47 Vict. c. 61; 63 & 64 Vict. c. 50.

(*g*) *Norton* v. *Cooper*, 5 De G. M. & G. 728.

(*h*) *County of Gloucester Bank* v. *Rudry, &c. Co.*, (1895) 1 Ch. 629, C. A.

(*i*) *Rowe* v. *Wood*, 2 J. & W. 553.

of severance, or otherwise (*k*). So, where mortgagees of a leasehold colliery entered into possession and obtained from the freeholder a lease to a trustee for them containing, amongst other covenants, a covenant to leave pillars of coal to support the roof; they sublet the colliery, and gave to their sub-lessees permission to work and remove the pillars; it was held that the mortgagees were chargeable with the full value of the coal subject to deduction of the expense of bringing it to the surface, but not for costs of severance (*l*).

Mortgagee with insufficient security.

But a mortgagee with an insufficient security may open new or work abandoned mines, and will be only liable to account for the profits or royalty, and not for the value of the ore raised, or the damage caused to the surface (*m*).

Permitting strangers to work mines.

Mortgagees permitting strangers to work mines have been held accountable for the proceeds (*n*).

Reckless working.

If there be reason to think that mines have been recklessly worked, with a view to undue profit, so as to leave them unfit for further working without a great outlay, the Court will direct an inquiry as to the working, and will charge the mortgagees with the amount of the loss or damage caused by such improper working (*o*).

Mortgagee not liable for previous acts of mortgagor.

Before taking possession of mines, mortgagees are not answerable in respect of acts of trespass and improper appropriation of adjoining minerals by their mortgagor; but they cannot avail themselves of any facilities thus acquired (*p*).

Carrying on business by mortgagee.

Where a mortgage of a block of residential chambers contained a power for the mortgagee on default to enter, and manage, and receive the rents and profits of the premises, and default having been made, the mortgagees took possession, and managed the business at a loss, and subsequently sold the premises, it was held that the mortgagees were entitled to be allowed, out of the proceeds of sale, the losses incurred in the management (*q*).

(*k*) *Hughes* v. *Williams*, 12 Ves. 493; *Thorneycroft* v. *Crockett*, 2 H. L. C. 239.

(*l*) *Taylor* v. *Mostyn*, 33 Ch. D. 226, C. A.

(*m*) *Millett* v. *Davey*, 31 Beav. 470.

(*n*) *Hood* v. *Easton*, 2 Giff. 692, appealed and compromised, 2 Jur. 917. See *Millett* v. *Davey*, *sup.*; *Elias* v. *Griffith*, 8 Ch. D. 521, 528, C. A.

(*o*) *Mulhallen* v. *Marum*, 3 Dr. & War. 317; *Taylor* v. *Mostyn*, 33 Ch. D. 226, C. A.

(*p*) *Powell* v. *Aiken*, 4 K. & J. 343.

(*q*) *Bompas* v. *King*, 33 Ch. D. 279, C. A.

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Default in completing buildings.

The mortgagee in possession is bound to act as a provident owner, and he will be liable for wilful default if, being in possession under a mortgage of unfinished leasehold buildings, he neither sells the property nor completes the buildings, whereby the leases are forfeited (*r*).

Repairs and improvements.

Unless the sanction of the mortgagor has been obtained, the mortgagee will not be allowed for substantial repairs, not being strictly necessary, or for improvements, unless the value of the property has been increased thereby (*s*). Nor will a receiver be allowed the cost of repairs, however desirable, unless directed in writing by the mortgagee (*t*). Nor will a first mortgagee be allowed to charge such repairs against a second mortgagee (*u*).

Substantial improvements.

Indeed, according to some older cases, even substantial improvements have been disallowed, unless done with the consent of, or acquiesced in after notice by, the mortgagor (*x*). And a mortgagee can hardly be said to be safe in making improvements on the mortgaged property without such consent or acquiescence (*y*).

Inquiry whether improvements are beneficial to the property.

But the tendency of later decisions appears to be more favourable to the mortgagee in this respect, and it has been laid down that, *primâ facie*, a mortgagee who has expended money in improvements is entitled to an inquiry whether the outlay has increased the value of the property, and to be allowed such outlay so far as the value is proved to have been increased thereby (*z*). And where a mortgagee had raised the question of improvements made by him in his pleadings and supported it by evidence, and the mortgagor did not in his pleadings raise any objections to the claim, the outlay was allowed (*a*).

It is to be remarked that it is not a matter of course to direct

(*r*) *National Bank of Australasia* v. *United, &c. Co.*, 4 App. Ca. 391.

(*s*) *Knowles* v. *Spence*, Mos. 226; *Murphy* v. *Meade*, 1 Jones, 620; *Johnson* v. *Bourne*, 2 Y. & C. C. C. 268; *Pelly* v. *Wathen*, 16 Jur. 47; *Sandon* v. *Hooper*, 6 Beav. 246; *Tipton Green Colliery Co.* v. *Tipton Moat Colliery Co.*, 7 Ch. D. 192.

(*t*) *White* v. *Metcalf*, (1903) 2 Ch. 567.

(*u*) *Ibid.*

(*x*) *Sandon* v. *Hooper*, 14 L. J. Ch. 120; *Unity Bank* v. *King*, 4 Jur. N. S. 470, L.J.; *Jortin* v. *S. E. Rail. Co.*, 6 De G. M. & G. 270.

(*y*) *Lord Trimleston* v. *Hamill*, 1 Ba. & Be. 385.

(*z*) *Shepard* v. *Jones*, 21 Ch. D. 469, C. A.; *Houghton* v. *Sevenoaks Estate Co.*, 33 W. R. 341; *Henderson* v. *Astwood*, (1894) A. C. 150, 163.

(*a*) *Powell* v. *Trotter*, 1 Dr. & S. 388. See *Hipkins* v. *Amery*, 2 Giff. 292.

an inquiry whether money has been laid out by the mortgagee in lasting improvements, if such mortgagee has not given any evidence in support of the fact (*b*).

Excessive improvements.

The improvements must not be such as to improve the mortgagor out of his property (*c*).

Pulling down and re-erecting buildings.

If he unnecessarily pulls down buildings, and erects new buildings without the consent of the mortgagor, he is liable for any loss of rent which is thereby occasioned, and will not be allowed for lasting improvements and repairs, if the result of the whole is that the value of the property is not increased (*d*).

Puisne mortgagee.

A second mortgagee is not allowed improvements against a first mortgagee (*e*). Nor will a first mortgagee be allowed repairs against a second mortgagee (*f*).

Mines.

A mortgagee will not be allowed improvements in mines (*g*).

Under the stat. 8 & 9 Vict. c. 56, the mortgagee or incumbrancer in fee in possession may obtain authority, by application to the Court, to make improvements by draining, &c., the expenses to be a charge on the land, payable by instalments, with interest (*h*).

Interest on expenditure on repairs, &c.

Interest is not as a matter of course allowed on sums expended by a mortgagee for repairs (*i*); but in some cases interest has been allowed on expenditure in necessary repairs or lasting improvements as from the time when the expense was incurred (*k*).

So a puisne incumbrancer who had redeemed the first mortgagee, and therefore stood in his place, was allowed only necessary repairs and lasting improvements (*l*).

Right of annuitant to allowance for repairs, &c.

Where a grantee of a rent-charge takes possession, and incurs expenses in necessary repairs, he has not, like a mortgagee in possession, any equity against the owner of the land subject to the rent-charge, who, on payment, has a legal right of entry;

(*b*) *Sandon* v. *Hooper*, 14 L. J. Ch. 120.

(*c*) *Ibid.*

(*d*) *Sandon* v. *Hooper*, *sup.*; *Gubbins* v. *Creed*, 2 Sch. & L. 214.

(*e*) *Landowners, &c. Drainage & Inclosure Co.* v. *Ashford*, 16 Ch. D. 412.

(*f*) *White* v. *Metcalf*, (1903) 2 Ch. 567.

(*g*) *Thorneycroft* v. *Crockett*, 2 H. L. C. 239.

(*h*) See also 9 & 10 Vict. c. 101; 10 & 11 Vict. c. 11.

(*i*) Seton (7th ed.), p. 1906, and cases there cited.

(*k*) *Quarrell* v. *Beckford*, 1 Madd. 281; *Webb* v. *Rorke*, 2 Sch. & L. 676; *Eyre* v. *Hughes*, 2 Ch. D. 148, 164. See also decrees in *Godfrey* v. *Watson*, 3 Atk. 518; *Neesom* v. *Clarkson*, 4 Ha. 97; *Moore* v. *Painter*, 6 Jur. 903.

(*l*) *Exton* v. *Greaves*, 1 Vern. 138.

if the grantee has a right to be reimbursed the expenses, it must be under the terms of his grant (*m*).

Though costs and expenses properly incurred for work done on the mortgaged property must be paid by the mortgagor as a condition of redemption, they do not constitute a debt, by virtue of implied contract, recoverable for which an action can be maintained by the mortgagee against the mortgagor (*n*).

When the accounts will be ordered to be taken with rests.

iv.—Of taking Accounts with Rests.—Where, in taking the accounts of real estate, it appears that the rents and profits received by a mortgagee in possession materially exceed the interest due on the mortgage debt, the Court may direct a balance to be struck and the surplus rents and profits, after meeting the interest, to be applied yearly, or sometimes half-yearly, in the reduction of the principal (*o*). This is called taking the account with rests. Rests will not be directed if the excess of rents and profits is trifling (*p*).

Principle of the rule as to rests.

The principle on which rests are directed in such cases is, that where a mortgagee, so long as any principal moneys remain due under his mortgage, receives rents and profits in excess of the interest from time to time due to him, and, instead of paying over such surplus to the mortgagor, retains it, and applies it to his own use, it is not just that the mortgagor should continue to pay interest on the whole mortgage debt; but the surplus rents and profits periodically retained by the mortgagee must be deemed to have been so retained in reduction of the principal.

But in a redemption action against a mortgagee in possession it is not the practice to direct the accounts to be taken with rests, and in the absence of such a direction the account of rents and profits will be taken without rests (*q*).

Form of decree with rests.

The form of a decree with rests is as follows:—

1. Account of principal and interest and costs.
2. Account of rents and profits on the foot of wilful default, &c.
3. And let what shall appear to be due on the said account of rents and profits be applied first in discharging the interest, and then in sinking the principal money secured by the mortgage, and

(*m*) *Hooper* v. *Cooke*, 2 Jur. N. S. 527; 20 Beav. 639.
(*n*) *Exp. Fewings, Re Sneyd*, 25 Ch. D. 338, C. A.
(*o*) *Thorneycroft* v. *Crockett*, 2 H. L. C. 239.
(*p*) *Shephard* v. *Elliot*, 4 Madd. 254.
(*q*) *Ainsworth* v. *Wilding*, (1905) 1 Ch. 435, *inf.*

if the same shall break in upon the principal, then rests are to be made from time to time, and interest to be computed only on the residue thereof (*r*).

Or the following:—

And in taking the said account of the said rents and profits, annual rests are to be made of the clear balance of such rents and profits in the hands of, &c., and interest is to be computed on such respective balances at a rate of 4 per cent. per annum, and in taking such annual rests, except the first, the interest of each preceding balance is to be included in such balance, so as to charge the said, &c., with compound interest thereon (*s*).

Mode of taking account with rests.

The proper mode of taking the account with rests appears to be, that as soon as the mortgagee has received a sum exceeding the amount of interest, a rest should be made, and from that date the subsequent annual rests should be computed, so that if the date of the mortgage deed be in July, and the mortgagee received sums in February exceeding the interest then due, a rest should be taken in February, and annual rests be thenceforth computed from that time, and not from July (*t*).

A balance must be struck at each rest by deducting the amount of the payments from the amount of the receipts, and charging interest on the balance up to that time (*u*); and the interest of each preceding balance must be included in the balance then stated, and interest computed on the total amount, so as to charge the accounting party with compound interest (*x*).

Account with rests directed only on special grounds.

A direction to take the account with rests is not of course; the usual course is not to give such a direction (*y*). The right of the mortgagee not to be paid off piecemeal must be taken into consideration (*z*). Some special grounds must therefore be shown, as that the rents and profits received by the mortgagee during his possession have considerably exceeded the interest (*a*); so if he has set up an unfounded claim to the

(*r*) Seton (7th ed.), 1885.

(*s*) *Cotham* v. *West*, 1 Beav. 380. See Seton (7th ed.), 1885.

(*t*) *Binnington* v. *Harwood*, T. & R. 477. As to the effect of a direction on a decree to make annual rests, see *Heighington* v. *Grant*, 5 My. & Cr. 258, and cases there cited.

(*u*) *Raphael* v. *Boehm*, 11 Ves. 92, 110.

(*x*) *Yates* v. *Hambly*, 1 Madd. 14.

(*y*) *Davis* v. *May*, 19 Ves. 382; *Finch* v. *Brown*, 3 Beav. 70; *Donovan* v. *Fricker*, Jac. 168; *Baldwin* v. *Lewis*, 4 L. J. Ch. 113. But see, as to Ireland, *Graham* v. *Walker*, 11 Ir. Eq. R. 415.

(*z*) *Horlock* v. *Smith*, 1 Coll. 287. See *Ashworth* v. *Lord*, 36 Ch. D. 545, at p. 551.

(*a*) *Gould* v. *Tancred*, 2 Atk. 533; *Donovan* v. *Fricker*, Jac. 168;

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equity of redemption (*b*), or denies his character as an incumbrancer (*c*); so where a mortgagee in possession comes to a settlement of accounts, by which it appears that no interest is then due, or the interest then due is converted into principal, and the mortgagee afterwards continues in possession (*d*).

If no special grounds are shown for a direction to take annual rests as from the beginning of the account, the Court will not generally direct annual rests as from a later date, so long as anything remains due under the mortgage (*e*).

The master must not take annual rests of rents received, unless specially directed by the decree (*f*); and where directions are omitted they cannot be directed in chambers under Ord. XXXIII. r. 2 (*g*).

Where part of the property is sold.

There is no rule or practice that a rest is to be made in the account of rents and profits whenever part of the mortgaged property is sold. The money received from the sale is credited to the mortgagor under the account of what is due, but unless rests have been ordered in the judgment the account of rents and profits goes on without rests (*h*).

Rests directed generally where no interest in arrear.

Where there is a material excess of rent, the fact that no interest was in arrear when possession was taken may be regarded by the Court, when taken with other circumstances, as affording a special ground for directing rests to be taken (*i*).

But the Court will not generally direct rests if the interest was in arrear when the mortgagee took possession (*k*). It seems that rents which are in the hands of a receiver when the mortgagee is let into possession, and which are, by a prior decree, directed to be paid over by him on passing the accounts to the mortgagee (although such payment does not, in fact, take place

Scholefield v. *Ingham*, C. P. Coop. 477.

(*b*) *Montgomery* v. *Calland*, 14 Sim. 79; *Douglas* v. *Culverwell*, 4 De G. F. & J. 20; *National Bank of Australasia* v. *United, &c. Co.*, 4 App. Ca. 391.

(*c*) *Incorporated Soc.* v. *Richards*, 1 Dr. & War. 258.

(*d*) *Wilson* v. *Cluer*, 3 Beav. 136.

(*e*) *Davis* v. *May*, 19 Ves. 382; *Latter* v. *Dashwood*, 6 Sim. 462; *Wilson* v. *Cluer*, 3 Beav. 136; *Scholefield* v. *Lockwood*, 32 Beav. 439. But see *inf.* p. 1238.

(*f*) *Gould* v. *Tancred*, 2 Atk. 533; *Webber* v. *Hunt*, 1 Madd. 13; *Davis* v. *May*, G. Coop. 240; *Donovan* v. *Fricker*, Jac. 168; *Neesom* v. *Clarkson*, 4 Ha. 97.

(*g*) *Nelson* v. *Booth*, 3 De G. & J. 119.

(*h*) *Wrigley* v. *Gill*, (1905) 1 Ch. 241, aff. (1906) 1 Ch. 165; *Ainsworth* v. *Wilding*, (1905) 1 Ch. 435.

(*i*) *Shephard* v. *Elliot*, 4 Madd. 254; *Nelson* v. *Booth*, 3 De G. & J. 119, 127; *Scholefield* v. *Lockwood*, 32 Beav. 439; *Moore* v. *Painter*, 6 Jur. 903.

(*k*) *Stephens* v. *Wellings*, 4 L. J. Ch. 281; *Wilson* v. *Cluer*, 3 Beav. 136; *Moore* v. *Painter*, 6 Jur. 903.

till long after), will, with reference to this question of an arrear of interest being due, be taken as already paid when the mortgagee took possession; and the same rule applies to money in Court, and which by the decree is directed to be paid to the mortgagee in part satisfaction of his debt (*l*).

When rests will not be directed.

From the circumstances of the case, the mere fact of an arrear of interest being due, or not, when the mortgagee takes possession, may not be decisive upon the question of rests; thus, where the mortgagee is desirous to take possession to defend his mortgage (*l*), or the mortgagee has been driven by the acts of others to take possession, and been harassed by litigation and thereby put to costs (even though the costs have afterwards been adjudged to be paid him by his opponent), and his own conduct has been free from harshness or vexation; or if, in the case of leaseholds, the security is endangered by non-payment of ground-rent, or insurance, or through want of repairs (*m*), or where possession is taken of a copyhold to avoid a forfeiture (*n*), rests will not be directed against him, though no rent was in arrear when he entered into possession.

If interest was in arrear when the mortgagee took possession, the fact that such arrears were subsequently paid off will not be a ground for a direction to take the account against the mortgagee with rests (*o*).

Agreement for tenancy.

Rests are not directed where the occupation is under an agreement for tenancy with the mortgagor (*p*).

When bills dishonoured.

Where bills have been given for the arrears of interest when the mortgagee takes possession, which are afterwards dishonoured, no rests are directed, for the interest is considered to have been in arrear when possession was taken (*q*).

Rests in new suit without fresh evidence.

If rests have been directed in a redemption suit afterwards abandoned, and a foreclosure suit is commenced by the mortgagee, the accounts will be taken with rests in the new suit, although there is no evidence in the new suit to warrant a decree with rests (*r*).

Interest, when charged against mortgagee.

If a mortgagee continues in possession after the rents and profits received by him have fully satisfied the debt, he will be regarded as availing himself of another man's money for

(*l*) *Horlock* v. *Smith*, 1 Coll. 287.
(*m*) *Patch* v. *Wild*, 30 Beav. 99.
(*n*) *Carter* v. *James*, W. N. (1881) 27; 29 W. R. 437.
(*o*) *Finch* v. *Brown*, 3 Beav. 70.
(*p*) *Page* v. *Linwood*, 4 Cl. & F. 399.
(*q*) *Dobson* v. *Land*, 4 De G. & S. 575.
(*r*) *Morris* v. *Islip*, 20 Beav. 654.

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his own use and benefit, and he ought to be charged with interest (*s*).

Where, therefore, a large balance is found to have been due from the mortgagee at the time of the commencement of the action, annual rests will be decreed on further consideration against a mortgagee in possession from the time it was ascertained the debt was paid off, although rests were not directed by the previous orders and decrees under which the accounts were taken, and though interest was not prayed by the action (*t*); and such rests will be directed as well in the case of an occupation rent as on an account of rents and profits actually received (*u*).

But it is to be observed that it is only when it appears from the certificate that there is an equitable right to charge an accounting party with interest that the Court directs the computation of interest, when it has not been reserved by the original decree (*x*).

Bankers.

Where bankers improperly, or without title, retain money overpaid to them as mortgagees, they are chargeable with interest thereon (*y*).

Mortgagee fully paid off retaining balances.

If the mortgagee was already paid in full at the time of the filing of the action, or on earlier demand made by the mortgagor, or by some other incumbrancer, he will be charged with interest on the balance then in his hands and on all subsequent annual balances due from him, not, in general, compound interest, but simple interest, from the end of each year, as the rents were received (*z*), and with costs (*a*), unless the decree to account contains no reservation on the question of costs (*b*). And in such cases the mortgagee will generally be charged with the ordinary rate of interest, as in the case of executors retaining balances in their hands, viz., 4 per cent. (*c*).

Where mortgagee is paid off pending suit.

Where a mortgagee in possession is satisfied out of the rents

(*s*) *Wilson* v. *Metcalfe*, 1 Russ. 530; *Ashworth* v. *Lord*, 36 Ch. D. 545, at p. 551.

(*t*) *Wilson* v. *Metcalfe*, 1 Russ. 530; *Lord Trimleston* v. *Hamill*, 1 Ba. & Be. 377, 388; *Ashworth* v. *Lord*, 36 Ch. D. 545. And see *Scholefield* v. *Ingham*, C. P. Coop. 477, and notes.

(*u*) *Wilson* v. *Metcalfe*, *sup.*

(*x*) Dan. Ch. Pr. (7th ed.) p. 950.

(*y*) *London Chartered Bank of Australia* v. *White*, 4 App. Ca. 413.

(*z*) *Quarrell* v. *Beckford*, 1 Madd. 269; *Archdeacon* v. *Bowes*, M'Cl. 149.

(*a*) *Binnington* v. *Harwood*, T. & R. 477, 485; and see 4 Beav. 215; *Archdeacon* v. *Bowes*, *sup.*

(*b*) *Lord Trimleston* v. *Hamill*, 1 Ba. & Be. 377, 388.

(*c*) *Quarrell* v. *Beckford*, 1 Madd. 269; *Archdeacon* v. *Bowes*, M'Cl. 149; *Eley* v. *Read*, 76 L. T. 39, C. A.

during the suit for redemption before defence, and he by his defence denies such satisfaction, he will be decreed to pay interest on the balances in his hands since the mortgage was paid off, with costs from the delivery of the defence (*d*). Where the debt is so satisfied between the delivery of the defence and the certificate, the mortgagee will be charged with interest on the balance in his hands at the date of the certificate, and on the rents subsequently received from the respective times of receiving them (*e*).

Section VI.

Appropriation of Payments.

General rule.

The general rule as to the appropriation of payments is, that where there are different debts, the option of appropriating a payment is in the first place given to the debtor, and, if not exercised by him, is given to the creditor.

Presumption where no express appropriation.

If there is no appropriation by either party, and there is a current account between them, as in the case of banker and customer, an appropriation is made by presumption of law according to the order of the items of the account, the first item on the debit side of the account being the item discharged or reduced by the first item on the credit side (*f*).

Intention.

But the rule is founded on a presumption of the creditor's intention, and will not be applied where it is proved by the conduct of the parties that the creditor had no such intention (*g*). The presumption, therefore, may be rebutted by evidence of a different intention (*h*), and is not applicable where the person has not the right to appropriate some of the items, as being illegal (*i*).

Death of surety.

After the death of a surety, by which the guarantee to secure a current account is at an end, the appropriation does not continue for the benefit of the estate of the surety (*k*).

(*d*) *Montgomery* v. *Calland*, 14 Sim. 79.

(*e*) *Lloyd* v. *Jones*, 12 Sim. 491.

(*f*) *Devaynes* v. *Noble* (*Clayton's Case*), 1 Mer. 585; *Re Stenning*, (1895) 2 Ch. 433; *The Mecca*, (1897) A. C. 286.

(*g*) *Deeley* v. *Lloyds Bank*, (1910) 1 Ch. 648.

(*h*) *City Discount Co.* v. *McLean*, L. R. 9 C. P. 692.

(*i*) *Cunliffe, Brooks & Co.* v. *Blackburn, &c. Benefit Building Soc.*, 9 App. Ca. 857.

(*k*) *Re Sherry*, 25 Ch. D. 692, C. A.

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Interest and principal.

Where the payments are not specially made, a general payment shall be applied in the first place to sink the interest before any part of the principal is discharged (*l*); but this does not apply where interest has been converted into capital (*m*).

Right of debtor to appropriate payment.

It is, however, the right of the debtor in the first instance to declare upon what account he pays the money (*n*), according to the maxim, *quicquid solvitur, solvitur secundum modum solventis,* and when he has so declared, the destination of the payment cannot be changed (*o*). It is not necessary that the person paying the money should in express terms declare the appropriation of it at the time of payment; it is sufficient if it can be inferred from the circumstances that he intended at the time of payment to appropriate it to one account specifically (*p*). If the debtor omits at the time of payment to declare upon what account the money was paid, no subsequent declaration by him will be effectual to effect an appropriation (*q*).

When creditor has right to appropriate.

If an appropriation has not been declared by the debtor, nor can be inferred from the circumstances, the right of appropriation then rests with the creditor (*r*), who may make the appropriation at any time after payment and before action brought or account settled between him and his debtor (*s*).

The rule applies though the effect is to postpone or defeat the creditor's security. It cannot be excluded merely because the creditor could not have intended to prejudice his security. If he intended to appropriate but was not alive to the effect of the appropriation, that will not exclude the rule (*t*).

The rule applies in the case of a banker who holds a mortgage to secure a current account and the earliest item of credit is appropriated to the earliest item of debit, but as soon as the bank receives notice of a second mortgage and the principle of *Hopkinson* v. *Rolt* (*u*) applies, then, it seems, the presumed

(*l*) *Chase* v. *Box,* Freem. Ch. 261.
(*m*) *Parr's Bank* v. *Yates,* (1898) 2 Q. B. 460.
(*n*) *Mills* v. *Fowkes,* 5 Bing. N. C. 455; *Bradley* v. *Heath,* 3 Sim. 543.
(*o*) *Hammersley* v. *Knowlys,* 2 Esp. 666; *Simson* v. *Ingham,* 2 B. & Cr. 65.
(*p*) *Shaw* v. *Picton,* 4 B. & Cr. 715; *Taylor* v. *London and County Banking Co.,* (1901) 2 Ch. 231, C. A.
(*q*) *Wilkinson* v. *Sterne,* 9 Mod. 427.
(*r*) *Mills* v. *Fowkes,* 5 Bing. N. C. 455.
(*s*) *Simson* v. *Ingham,* 2 B. & Cr. 65; *The Mecca,* (1897) A. C. 286.
(*t*) *Deeley* v. *Lloyds Bank,* (1910) 1 Ch. 648, per Cozens-Hardy, M.R.
(*u*) *Post,* p. 1257.

intention should be to apply the payments to unsecured items in priority to the secured items (*x*).

Current account.

Where a mortgage is given to secure a current account, but so that the whole amount of the principal shall not exceed a certain sum, any moneys received by the mortgagee from sales of the property must be applied in reduction of the amount secured by the mortgage, and cannot be appropriated by the mortgagee in satisfaction of moneys in excess of that amount owing on the general account between him and the mortgagor (*y*).

Book debt.

Where a mortgagee by deposit, being also creditor in respect of a book debt, consents to a sale of the premises, he cannot appropriate an instalment of the purchase-money received by him in payment of the book debt (*z*).

Partnership account.

Where a partnership account with a bank is overdrawn and the account is continued by the surviving partner after dissolution the rule in *Clayton's Case* does not apply, and a mortgage by deposit of real estate of the partnership given by the surviving partner to the bank to secure an overdraft is entitled to priority over the lien of the deceased partner's executors (*a*).

(*x*) *Deeley* v. *Lloyds Bank*, *sup.*, per F. Moulton, L.J.

(*y*) *Johnson* v. *Bourne*, 2 Y. & C. C. C. 268. See *Mutton* v. *Peat*, (1900) 2 Ch. 79, C. A.

(*z*) *Young* v. *English*, 7 Beav. 10.

(*a*) *Re Bourne*, (1906) 2 Ch. 427.

Part VII.

PRIORITY OF MORTGAGES.

CHAPTER LV.

THE PRIORITY AS BETWEEN THEMSELVES OF SUCCESSIVE MORTGAGEES OF LAND.

SECTION I.

THE PRIORITY OF A MORTGAGEE HAVING THE LEGAL ESTATE.

1.—Where Equities are equal, Legal Estate prevails.—"*In æquali jure, melior est conditio possidentis:* where equity is equal the law shall prevail, and he that hath only a title in equity shall not prevail against law and equity."

Grounds on which the rule is founded.

In considering this rule of equity, Lord Hardwicke remarked (*a*) that "it could not happen in any other country but this, because the jurisdiction of law and equity is administered in different Courts, and creates different kinds of rights in estates; and therefore, as Courts of Equity break in upon the common law, where necessity and conscience require it, still they allow superior force and strength to a legal title to estates; and, therefore, where there is a legal title and equity on one side, the Court of Chancery never thought fit that, by reason of a prior equity against a man who has a legal title, that man should be hurt, and this by reason of the force which the Court necessarily and rightly allows to the common law and to legal titles; but if this had happened in any other country, it could never have been made a question; for if the law and equity are administered by the same jurisdiction, the rule, *qui prior est tempore, potior est jure*, must hold."

(*a*) *Wortley* v. *Birkhead*, 2 Ves. Sen. 574.

The Judicature Act (*b*), however, has made no alteration in the law in this respect. All Divisions of the Court can now administer both law and equity, but now, as formerly, where equities are equal, legal estates, powers, and interests must prevail.

Rule not altered by Jud. Act.

A mortgagee who has the legal estate, as a general rule, prevails over all other mortgages, charges, and incumbrances (*c*), whether he be the first or a subsequent incumbrancer.

Puisne legal mortgagee preferred to prior equitable mortgagee.

The doctrine that where equities are equal the legal title will prevail applies in favour of all equitable incumbrancers who, without notice of prior equitable interests, get in the legal estate from persons who commit no breach of trust in conveying it to them. A puisne mortgagee who advanced his money without notice of a prior mortgage getting in a legal estate, can recover the land in an action against the first mortgagee; and any one of several equitable incumbrancers can gain such priority over the rest (*d*). If the owner of an equitable estate makes a mortgage, and then acquires the legal estate, and makes a second mortgage in such form as to pass to the second mortgagee the legal estate, the latter mortgage will prevail (*e*). The Court is not scrupulous by what means a *bonâ fide* incumbrancer, without notice at the time of advancing his money, obtains a legal protection for his security, for if he get in a judgment or statute which is satisfied, yet if he can make use of it for his protection, the Court will not interfere to prevent him (*f*).

Extent of the doctrine.

A legal estate in reversion will be postponed to an immediate legal interest. So if an estate in fee is mortgaged subject to a term, an incumbrancer who gets in the term will have priority over the mortgagee of the fee (*g*). So, also, an immediate term created by a tenant for life under a power out of the inheritance to secure a charge on his life interest, was held to have priority over a reversionary portions term subsequently created by him subject to his life interest (*h*).

Priority of immediate legal estate.

A mortgage by a tenant for life or other limited owner of

Priority of mortgages by

(*b*) 36 & 37 Vict. c. 66, s. 24, sub-s. 6.

(*c*) Bac. Abr. Mortgage, E. 3.

(*d*) *Bates* v. *Brothers*, 2 Sm. & G. 509; *Bailey* v. *Barnes*, (1894) 1 Ch. 25, C. A.

(*e*) *Goodtitle* v. *Morgan*, 1 T. R. 755; *Right* v. *Bucknell*, 2 B. & Ad. 278.

(*f*) *Edmunds* v. *Povey*, 1 Vern. 187; *Sadler* v. *Bush*, 2 Vern. 30.

(*g*) *Exp. Knott*, 11 Ves. 609.

(*h*) *Hurst* v. *Hurst*, 16 Beav. 372. See *Simpson* v. *O'Sullivan*, 7 Cl. & F. 550.

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tenants for life under Settled Land Acts.

settled lands under sect. 18 of the Settled Land Act, 1882 (*i*), as extended by sect. 11 of the Settled Land Act, 1890 (*k*), passes to the mortgagee the legal estate in fee or for any less estate or interest the subject of the settlement, and so gives to the security priority over all estates, interests, and charges subsisting or to arise thereunder, except such as are prior to the settlement, or as have been conveyed or created to secure money actually raised at the date of the mortgage deed, and also except leases and fee farm and other grants for valuable consideration made prior to that deed (*l*). Mortgagees, therefore, who have lent their money on the security of the land are not to have their security on the land itself transferred to the purchase-money at the will of the tenant for life (*m*).

Acquisition of legal reversionary term.

It was held in one case (*n*), by Sir R. Malins, V.-C., that the assignment of a nominal legal reversion in a term of years would prevail over an equitable charge on the property. On appeal the Lords Justices expressed some doubt as to the correctness of the decision, but the case was compromised before it had been fully argued, and consequently no judgment was delivered.

Acquisition of satisfied or attendant term.

In like manner an equitable incumbrancer might use a satisfied term for his protection (*o*), even against the Crown (*p*). Nor is it material that no consideration be paid by the mortgagee for the assignment of a judgment or term (*q*). But no protection was afforded by getting in a term attendant on the inheritance (*r*), and the above observations as to terms do not apply if they are merged under the Satisfied Terms Act (*s*).

Legal estate of part of property.

Getting in the legal estate in part of a security will not protect the incumbrance over the rest (*t*).

When legal estate may be got in.

If the incumbrancer have no notice at the time of his advance, he can, as a general rule, get in the legal estate or title at any time, either before or at the time of the advance (*u*); or at any

(*i*) 45 & 46 Vict. c. 38, s. 18, set out *ante*, p. 393.

(*k*) 53 & 54 Vict. c. 69, s. 11, set out *ante*, p. 394.

(*l*) Settled Land Act, 1882, s. 20; *ante*, p. 402. As to the meaning of "actually raised," see *Connolly* v. *Keating*, (1903) 1 Ir. R. 353. See as to mortgages by tenants for life, &c., under their statutory powers, *ante*, pp. 393 *et seq.*

(*m*) *Re Mundy and Roper*, (1899) 1 Ch. 275.

(*n*) *Re Russell Road Purchase-Moneys*, L. R. 12 Eq. 78.

(*o*) *Maundrell* v. *Maundrell*, 10 Ves. 270.

(*p*) *Nicholls* v. *Howe*, 2 Vern. 389.

(*q*) *Churchill* v. *Grove*, 1 Ch. Ca. 35; *Holt* v. *Mill*, 2 Vern. 279.

(*r*) *Nicholls* v. *Howe*, 2 Vern. 389.

(*s*) 8 & 9 Vict. c. 112.

(*t*) *Marsh* v. *Lee*, 1 Ch. Ca. 162.

(*u*) *Earl of Huntington* v. *Green-*

time afterwards (*x*), although between payment and getting in the legal title he had notice (*y*), and even after suit (*z*). But he cannot gain priority by getting in the legal title where there are circumstances which make it inequitable for him so to do (*a*).

Legal estate got in by mistake.

It was held that where an incumbrancer obtains possession of the legal estate by mistake, he cannot avail himself of it (*b*); but this has been disapproved of (*c*).

Mistake as to title.

Where an heir by mistake mortgaged land belonging to beneficiaries under a will, and the mortgagee sold under his power of sale, the beneficiaries were held entitled to adopt the sale and follow the purchase-money (*d*).

Trustee-mortgagee may avail himself of the rule.

This rule applies so as to entitle a trustee to avail himself of his legal estate as a protection to an assignment of the equitable interest to secure money advanced by him to his *cestui que trust* as against a prior incumbrancer, of whose charge he had no notice at the time of the advance (*e*).

Priority of equitable mortgagee with best right to call for legal estate.

ii.—Equitable Mortgagee with best Right to Legal Estate.—The title of a mortgagee who has not actual possession of the legal estate may nevertheless be protected as against other incumbrances, so long as the legal estate is outstanding, if he has the best right to call for a conveyance or assignment of it; for in such case, the creditor having such right will, under certain circumstances, be placed in equity in the same situation as if he had obtained an actual assignment (*f*). It is sufficient if the incumbrancer has a declaration in trust of the legal interest in his favour (*g*); or if he has obtained the best right

ville, 1 Vern. 49. See *Cooke* v. *Wilton*, 29 Beav. 100.

(*x*) *Willoughby* v. *Willoughby*, 1 T. R. 763; *Barnett* v. *Weston*, 12 Ves. 130; *Cooke* v. *Wilton*, 29 Beav. 100; *Sharpe* v. *Foy*, L. R. 4 Ch. 35; *Taylor* v. *Russell*, (1892) A. C. 244.

(*y*) *Blackwood* v. *London Chartered Bank of Australia*, L. R. 5 P. C. 92, 113; *Spencer* v. *Pearson*, 24 Beav. 266; *Taylor* v. *Russell*, *sup.*

(*z*) *Ibid.*; *Bates* v. *Brothers*, 2 Sm. & G. 509.

(*a*) *Taylor* v. *London and County Banking Co.*, (1901) 2 Ch. 231, C. A.

(*b*) *Carter* v. *Carter*, 3 K. & J. 617.

(*c*) *Pilcher* v. *Rawlins*, L. R. 7 Ch. 259.

(*d*) *Re Champion*, (1893) 1 Ch. 101, C. A.

(*e*) *Newman* v. *Newman*, 28 Ch. D. 674.

(*f*) See *Wyndham* v. *Richardson*, 2 Ch. Ca. 213; *Wilkes* v. *Bodington*, 2 Vern. 599; *Pomfret* v. *Windsor*, 2 Ves. Sen. 472, 487; *Exp. Knott*, 11 Ves. 618; *Allen* v. *Knight*, 11 Jur. 527.

(*g*) *Willoughby* v. *Willoughby*, 1 T. R. 763; *Stanhope* v. *Verney*, 2 Ed. 81; *Wilkes* v. *Bodington*, 2 Vern. 599; *Wilmott* v. *Pike*, 5 Ha. 22; *Taylor* v. *London and County Banking Co.*, *sup.* But see *contra*, *Frere* v. *Moore*, 8 Pri. 475.

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to call for a transfer, by having done some act short of obtaining a transfer, but equivalent to an act of ownership (*h*), such as obtaining the custody of the title deeds (*i*); or making the trustee a party to the instrument (*k*); or entering into a contract for a legal mortgage at the time of the first advance, followed by a conveyance of the legal estate without notice, which will relate back so as to give priority over a charge intermediate between the advance and completion of the legal mortgage (*l*). But a covenant to produce the deeds respecting the term will not suffice; nor will the bare right to call for the legal estate without some act as hereinbefore mentioned avail. And it would seem that even a declaration of trust will not prevail against a subsequent *bonâ fide* incumbrancer without notice who has obtained an actual assignment (*m*).

Agreement to execute a legal mortgage.

The mere fact that an equitable charge contains an undertaking to execute a legal mortgage does not defeat the right of priority of a subsequent legal mortgagee (*n*).

Vesting declaration.

Where a mortgagor by deposit declared himself a trustee of the legal estate for the mortgagee, who subsequently appointed new trustees in place of the mortgagor, it was held that a vesting declaration contained in the deed of appointment operated so as to divest the legal estate out of a subsequent legal mortgagee with notice of the trust, and enabled the equitable mortgagee to set it up against a prior incumbrance of which he had no notice at the date of his own equitable mortgage (*o*).

Effect of statutory receipt of building society.

The indorsed receipt of the trustees of a benefit building society vests the legal estate in the persons who have the best right to call for it (*p*). And accordingly, where a member of a building society made a mortgage to the trustees of the society, and a subsequent mortgage to the respondents; the appellants paid off the society's mortgage, and the receipt of the trustees

(*h*) *Pomfret* v. *Windsor*, 2 Ves. Sen. 472; *Maundrell* v. *Maundrell*, 10 Ves. 271; *Exp. Knott*, 11 Ves. 609; Sug. V. & P. (11th ed.) p. 784.

(*i*) *Layard* v. *Maud*, L. R. 4 Eq. 397; *Stanhope* v. *Earl Verney*, 2 Ed. 81. See *ante*, pp. 834 *et seq.*

(*k*) *Maundrell* v. *Maundrell*, *sup.*

(*l*) *Cooke* v. *Wilton*, 29 Beav. 100; *Taylor* v. *London and County Banking Co.*, *inf.*

(*m*) *Stanhope* v. *Earl Verney*, *sup.*

(*n*) *Garnham* v. *Skipper*, 55 L. J. Ch. 263; explaining a dictum to the contrary in *Maxfield* v. *Burton*, L. R. 17 Eq. 17, at p. 19. Cf. *Crosbie Hill* v. *Sayer*, *inf.*

(*o*) *London and County Bank* v. *Goddard*, (1897) 1 Ch. 642. And see *Taylor* v. *London and County Banking Co.*, (1901) 2 Ch. 231, C. A.

(*p*) *Ante*, p. 578.

was indorsed thereon; the mortgagor at the same time made a fresh mortgage to the appellants, who had no notice of the respondents' mortgage, to secure the amount paid to the society and a further advance to the mortgagor; it was held that the appellants were entitled to add the further advance so as to rank in priority over the respondents' mortgage (*q*).

So where D. mortgaged freeholds to a building society, and his bankers paid off the mortgage and took the usual statutory receipt, D. then by means of forged deeds executed what purported to be a legal mortgage to the defendant. Subsequently the plaintiffs paid off the bank and took a mortgage of the property from D.; it was held that the statutory receipt vested the legal estate in the bank, and that the plaintiffs, having the best right to call for the legal estate, had priority over the defendant (*r*).

iii.—Judgment Creditor.—A judgment creditor who, by actual execution at law, obtains the legal estate will also be thereby given priority over incumbrancers whose securities are subsequent in date to his judgment.

By the stat. 27 & 28 Vict. c. 112, a judgment did not affect the lands of the debtor until such lands had been actually taken in execution (*s*). And now, by the Land Charges Act, 1900 (*t*), a judgment does not operate as a charge on land until a writ or order enforcing it is registered. But although a judgment creditor obtain the legal estate it will not enable him to claim priority by virtue of that estate over equitable incumbrances prior in date to his judgment, inasmuch as the debtor himself had only an interest in the land subject to such prior incumbrances, and could not have any power to charge, or agree to charge, the lands in favour of the creditor so as to defeat them (*u*).

(*q*) *Hosking* v. *Smith*, 13 App. Ca. 582, overruling *Pease* v. *Jackson*, L. R. 3 Ch. 576, and *Robinson* v. *Trevor*, 12 Q. B. D. 423, C. A.

(*r*) *Crosbie Hill* v. *Sayer*, (1908) 1 Ch. 866.

(*s*) See *ante*, p. 670.

(*t*) 63 & 64 Vict. c. 26, s. 2; *ante*, p. 670.

(*u*) See *Whitworth* v. *Gaugain*, 3 Ha. 416, 427, 429.

Section II.

Tacking.

Tacking against mesne incumbrancers.

i.—Nature and Extent of the Doctrine of Tacking generally.—The possession or acquisition of the legal estate by a mortgagee not only gives him priority as against other incumbrancers, whether prior or subsequent in point of time to the security to which that estate is annexed, but may also give priority to securities upon the same property, whether originally created in his favour, or in favour of a third person and subsequently got in by him, with the effect of squeezing out or postponing the securities of intermediate incumbrancers.

A mortgagee cannot, however, thus gain priority where the circumstances are such as to make it inequitable for him to do so—as would be the case, for example, if the legal estate were held on express trusts, or if it were vested in a satisfied mortgagee (*x*).

Foundation of the doctrine.

This doctrine, which is usually termed the doctrine of tacking, is founded upon the maxim, that "where equities are equal the law shall prevail," and forms an exception to the general rule of equity that incumbrances shall rank in priority in point of time. The Judicature Act (*y*) has not altered the doctrine of tacking.

Extent of doctrine.

The doctrine of tacking is applicable both to real and personal estate, and its effect is only to change the order of priority, and not to alter the mode of discharging the securities (*z*).

Tacking formerly disapproved of.

The doctrine of tacking is of long standing and firmly established, though it has at times been viewed with disfavour (*a*).

There is, however, nothing in itself inequitable in so disarranging equities (*b*).

Abolition by V. & P. Act, 1874;

The doctrine, which is entirely based on the superior force and strength allowed by the Courts of Equity to a legal title to estates (*c*), is in its effect often productive of great hardship,

(*x*) *Taylor* v. *Russell*, (1892) A. C. 244.
(*y*) 36 & 37 Vict. c. 66.
(*z*) *Lord Dunsany* v. *Latouche*, 1 Sch. & L. 137, 163; *Montgomery* v. *Donohoe*, 6 Ir. Ch. R. 168.
(*a*) 1 Vern. 187. See *Holt* v. *Mill*, 2 Vern. 279. See also per Lord Blackburn in *Jennings* v. *Jordan*, 6 App. Ca. at p. 714.
(*b*) *Taylor* v. *Russell*, (1892) A. C. 244, 261, per Lord Macnaghten.
(*c*) *Wortley* v. *Birkhead*, 2 Ves. Sen. 574. See *ante*, p. 1242.

and the attention of the legislature having been directed to the subject, it was provided by the Vendor and Purchaser Act, 1874 (*d*), s. 7, that, after the commencement of the Act (*e*), protection and priority by legal estate and tacking should not be allowed.

repealed by Land Transfer Act, 1875.

This enactment was repealed as to England, as from the day on which it came into operation, by the Land Transfer Act, 1875 (*f*), s. 129, except as to anything duly done thereunder before the commencement of the latter Act (*g*); and, as to Ireland, it was repealed by sect. 73 of the Conveyancing Act, 1881 (*h*).

Tacking not allowed in Yorkshire.

By the Yorkshire Registries Act, 1884 (*i*), ss. 14, 16, it is provided that, as regards lands and hereditaments within the three ridings of the county of York, and the town of Kingston-on-Hull, mortgages and other assurances rank in priority according to the dates of their registration, except in cases of actual fraud (*k*); and no priority or protection by legal estate or tacking is given or allowed after the commencement of the Act, except as against any estate or interest existing prior to such commencement, although the person claiming such protection is a purchaser for value without notice.

Middlesex.

Registration of deeds in Middlesex is not notice, and the general rules as to tacking apply to mortgages of lands in that county (*l*).

Land Transfer Acts.

But registration of title under the Land Transfer Acts, 1875 and 1897, would seem almost necessarily to be notice (*m*), and tacking, therefore, appears to be abolished in the case of registered charges.

Ireland.

The doctrine of tacking has been adopted by the Irish Courts (*n*), but its application is now rendered obsolete by the provisions of the Irish Registry Act (*o*), whereby the priority of incumbrances *inter se* is regulated according to the time at which the memorials thereof were respectively registered (*p*).

(*d*) 37 & 38 Vict. c. 78.
(*e*) 7th August, 1874.
(*f*) 38 & 39 Vict. c. 87.
(*g*) 1st January, 1876. See 12 Q. B. D. at p. 433.
(*h*) 44 & 45 Vict. c. 41.
(*i*) 47 & 48 Vict. c. 54.
(*k*) *Battison* v. *Hobson*, (1896) 2 Ch. 403.
(*l*) *Bedford* v. *Backhouse*, 2 Eq. Ca. Abr. 615; *Cator* v. *Cooley*, 1 Cox, 182. See *Arden* v. *Arden*, 29 Ch. D. 702.
(*m*) See 60 & 61 Vict. c. 65, s. 8 (1).
(*n*) *Bushell* v. *Bushell*, 1 Sch. & L. 90; *Underwood* v. *Lord Courtown*, 2 Sch. & L. 41; *Pentland* v. *Stokes*, 2 Ba. & Be. 75.
(*o*) 6 Anne, c. 2.
(*p*) *Post*, p. 1276.

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Who may tack.

Tacking may be effected in one of two ways so as effectually to oust a mesne incumbrancer. Either an equitable mortgagee may protect himself by getting in a prior legal mortgage (*q*), or a legal mortgagee may tack a further advance (*r*), or a subsequent judgment or statute (*s*), or a subsequent equitable security originally made to secure moneys advanced by another person and transferred to himself (*t*).

ii.—Rules in Brace v. Duchess of Marlborough.—The doctrine of tacking was discussed very fully in the case of *Brace* v. *Duchess of Marlborough* (*u*), wherein three general rules were laid down, which it is proposed in this place to state and discuss, pointing out in what respects the law as laid down in that case has been confirmed or altered.

First rule. Purchase of legal estate will prevail.

The first general rule laid down in *Brace* v. *Duchess of Marlborough* is, "that if a third mortgagee buy in a first mortgage, though it be *pendente lite*, pending a bill brought by the second mortgagee to redeem the first, yet the third mortgagee having obtained the first mortgage, and having the law on his side and equal equity, he shall thereby squeeze out the second mortgagee."

Rule long established in equity.

The rule in question appears to have invariably prevailed in equity; for we find it laid down in a very early case (*x*), and re-affirmed in the leading case of *Marsh* v. *Lee* (*y*), and, since that decision, it has never been open to question that if a purchaser or mortgagee comes in upon a valuable consideration without notice, and purchases a precedent incumbrance, "the legal title shall protect his estate against any person that hath a mortgage subsequent to the first and before the last mortgage, though he purchased in the incumbrance after he had notice of the second mortgage; for he hath both law and equity" (*z*).

Lis pendens will not oust the rule.

On this proposition a matter of great importance occurs, viz., that although the third mortgagee get in the first mort-

(*q*) *Goddard* v. *Complin*, 1 Ch. Ca. 119.

(*r*) *Bedford* v. *Backhouse*, Kelynge, 5; *Williams* v. *Owen*, 13 Sim. 597; *Lloyd* v. *Attwood*, 3 De G. & J. 614.

(*s*) *Shepherd* v. *Titley*, 2 Atk. 348; *Jackson* v. *Langford*, 2 Ves. Sen. 662; *Brace* v. *Duchess of Marlborough*, 2 P. Wms. 491.

(*t*) *Cooke* v. *Wilton*, 29 Beav. 100.

(*u*) 2 P. Wms. 491.

(*x*) *Churchill* v. *Grove*, 1 Ch. Ca. 35. See *Hacket* v. *Wakefield*, Hard. 172.

(*y*) 2 Ventr. 337. See *S. C.*, in Wh. & T. L. C. Eq. (7th ed.) Vol. II. p. 107.

(*z*) See *Taylor* v. *Russell*, (1892) A. C. 244.

gage, &c.; *pendente lite*, he shall nevertheless be allowed to tack. The principle on which the doctrine is founded is satisfactorily explained by Lord Keeper Henley (*a*). He says, "The rule of equity requires no more than that the third mortgagee should not have had notice of the second at the time of lending the money; for it is by the lending the money without notice that he becomes an honest creditor, and acquires the right to protect his debt. But he is not compelled to look for this protection till his debt is in danger of being prejudiced; and, therefore, when that danger is first discovered to him (whether it be by suit in equity, or by any extra-judicial means), as the honesty of his debt is not affected by the discovery, so the right of protecting that debt, and the efficacy of such protection, are not prejudiced; hence arose the rule which permitted the subsequent incumbrancers to purchase *pendente lite*."

This point may be considered as established. It will be seen that in *Marsh* v. *Lee* there was in fact *lis pendens* at the time the mortgage was got in, and in subsequent cases the rule has been adhered to (*b*).

Decree prevents tacking.

But although it is thus established that *lis pendens* is not sufficient to prevent the third mortgagee from tacking his debt to a prior security, yet the Court will not allow him to tack after a decree to settle priorities has been made. In *Bristol* v. *Hungerford* (*c*), a mortgage creditor got in a judgment after the first decree was made, and in truth after the Master's report; and Lord Cowper held that the mortgagee should not have the benefit of the judgment to protect his mortgage.

In a subsequent case (*d*), Lord Hardwicke confirmed Lord Cowper's decree; and in a more recent case (*e*), Lord Eldon observed, "There is no difficulty upon the point as to a decree to settle priorities. After that, you cannot tack certainly, for there is a judgment for the creditors that they shall be paid according to their priorities. But you may (as held in the House of Lords (*f*)), up to the time of the decree, struggle

(*a*) *Belchier* v. *Butler*, 1 Ed. 522, at p. 530.

(*b*) *Turner* v. *Richmond*, 2 Vern. 81; *Robinson* v. *Davison*, 1 Bro. C. C. 63; *Peacock* v. *Burt*, 4 L. J. (N. S.) Ch. 33; *Bates* v. *Johnson*, John. 304; *Rooper* v. *Harrison*, 2 K. & J. 86; *Bailey* v. *Barnes*, (1894) 1 Ch. 25, C. A.

(*c*) 2 Vern. 524.

(*d*) *Wortley* v. *Birkhead*, 2 Ves. Sen. 574.

(*e*) *Exp. Knott*, 11 Ves. 619.

(*f*) *Belchier* v. *Renforth*, 5 Bro. P. C. 292.

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for the *tabula in naufragio*, and although the decree is in a sense only a judgment upon the rights as they stood at the time of the bill filed, yet it was decided in that case that until the decree you may tack."

Advance to be tacked must have been made on the security of the land.

On the ground that no right of tacking exists where the sum to be tacked was not advanced upon the security of the land (*g*), a third party, who advances money to the vendor of an estate contracted to be sold upon the security of an assignment of the purchase-money, cannot, by getting in a first mortgage, tack to that the sum he so advanced as against the purchaser, if the purchase-money be exhausted in payment of incumbrances which had been concealed by the vendor (*h*); and the same would of course follow if the purchase-money had been all, or in great part, paid at the time of the contract, or had been subsequently paid to the vendor without notice, on the part of the purchaser, of the claim of the third party.

Notice at time of advance prevents tacking.

In all instances of the right to tack, it is essential that the party claiming the right had no notice of the other incumbrance at the time of lending his money, for (as observed in *Brace* v. *The Duchess of Marlborough* (*i*)), this is his sole equity, and the notice must positively be denied (*k*), whether charged by the action or not (*l*).

Notwithstanding doubts (*m*) whether there was any case in which a third mortgagee had excluded the second, if the first mortgagee, when he conveyed to the third, knew of the second, it has been decided that the notice given by the second mortgagee to the first mortgagee did not prevent the third mortgagee, who lent his money without notice, from tacking (*n*). But this doctrine is not to be extended (*o*).

The general principles as to notice as affecting the right of an equitable incumbrancer to get in the legal estate so as to protect his title, which will be considered later (*p*), equally affect his right to get in the estate so as to tack his security to a first legal mortgage, so as to gain priority over mesne incumbrancers.

(*g*) See *ante*, p. 1248.

(*h*) *Lacey* v. *Ingle*, 2 Ph. 413, following *Exp. Knott*, 11 Ves. 617.

(*i*) 2 P. Wms. at p. 494.

(*k*) *Cason* v. *Round*, Prec. Ch. 226.

(*l*) See note to *Jones* v. *Thomas*, 3 P. Wms. 243.

(*m*) *Maundrell* v. *Maundrell*, 10 Ves. 246; *Mackreth* v. *Symmons*, 15 Ves. 335.

(*n*) *Peacock* v. *Burt*, 4 L. J. (N. S.) Ch. 33.

(*o*) *West London, &c. Bank* v. *Reliance, &c. Soc.*, 29 Ch. D. 954, per C. A.

(*p*) *Post*, Chap. LVIII. Sect. II.

Where the first mortgagee has a mortgage of only part of the land, a third mortgagee of the whole land, without notice of a second mortgage thereof, can, by tacking, only obtain priority over that part (*q*), and where such first mortgagee has also a statute, which is purchased by the third mortgagee, who extends the land under it, he still obtains no protection beyond the extended value (*r*).

Tacking as to part.

Conversely, if the first legal mortgage extends to an entire estate, a subsequent equitable incumbrancer of part only of the estate obtaining a transfer of the first mortgage is entitled to hold the whole estate, until he is satisfied, against a mesne incumbrancer either of the whole (*s*), or of the part not comprised in his own equitable charge (*t*).

Tacking as against incumbrance on part.

It was settled that, under the old law, a third mortgagee might protect himself if he acquired the legal estate by means of getting in a prior statute or judgment, and so enable himself to squeeze out mesne incumbrancers, of whose charges he had no notice, by tacking his mortgage to the judgment (*u*). The reason for this seems to have been that inasmuch as the creditor, whose judgment was got in, had, by extending the lands under his judgment, acquired the legal estate, and also the debtor's interest therein at the time when judgment was obtained, and as the third mortgagee had originally lent his money on the credit of the land over which he had taken an equitable charge, the Court allowed him to protect or fortify his title by getting in the legal estate whenever it might be outstanding, as against incumbrances intermediate between the judgment and his own mortgage, and of whose existence he had no knowledge at the time of his advance.

Tacking by getting in prior judgment or statute.

It was said in an old case (*x*) that the buying in of satisfied incumbrances might not be allowed where a person was designing a fraud; and where by fraud a prior incumbrance was procured to be vacated, the person aggrieved was put in the same position as if it were in force (*y*).

The question was formerly thought to be one of some doubt whether the purchase of a prior judgment (even though the land

Whether a puisne incumbrance

(*q*) *Marsh* v. *Lee*, 2 Ventr. 337.
(*r*) *Ibid.*
(*s*) *Bovey* v. *Skipwith*, 1 Ch. Ca. 201.
(*t*) *Atherley* v. *Barnett*, W. N. (1885) 70; 52 L. T. 736.
(*u*) *Churchill* v. *Grove*, 1 Ch. Ca. 35; *Hacket* v. *Wakefield*, Hard. 172; *Edmunds* v. *Povey*, 1 Vern. 187; *Sadler* v. *Bush*, 2 Vern. 30.
(*x*) *Edmunds* v. *Povey*, 1 Vern. 187.
(*y*) *Earl of Huntington* v. *Greenville*, 1 Vern. 49.

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had been actually delivered in execution, so as to give to the creditor the legal estate) would enable a subsequent incumbrancer to tack his equitable charge to the judgment, so as to claim priority as against mesne incumbrancers. It is, however, conceived that in the present state of the law there is little or no doubt as to the right of a subsequent incumbrancer to get in and tack his incumbrance to a prior judgment perfected by registration.

can be tacked to a judgment.

Tacking in bankruptcy.

The bankruptcy of a mortgagor does not, as a general rule, deprive a mortgagee of his right of tacking (*z*).

Second rule.

Judgment creditor cannot tack his judgment to a first mortgage.

The second rule laid down in *Brace* v. *The Duchess of Marlborough* (*a*) is, "that if a judgment creditor, or creditor by statute or recognizance, buys in the first mortgage, he shall not tack or unite this to his judgment, &c. (*b*), and thereby gain a preference; for such a creditor cannot be called a purchaser, nor has he any right to the land; he has neither *jus in re*, nor *jus ad rem*. All that he has by his judgment is a lien on the land, but *non constat* whether he will ever make use of it, for he may take his debt out of the goods of his debtor by *fieri facias*, or may take his body, after which, during the defendant's life, he can have no other execution: besides which, the judgment creditor does not lend his money on the immediate view or contemplation of the land, nor is he deceived or defrauded though his debtor had before made twenty mortgages of his estate; but a mortgagee is defrauded or deceived if the mortgagor has already mortgaged his land to another."

Reasons for the rule.

This rule and the reasons for it are so distinctly explained in the preceding statement that little remains to be said on it. The distinction between the right of a puisne mortgagee, having a specific lien, to tack his mortgage to a judgment, and of a judgment creditor, having no actual charge or lien, but only a prospect of acquiring one, or, as it was sometimes inaccurately called, a "general lien," to tack his judgment to a mortgage, seems to have been fully established. It was recognized by Lord Hardwicke, in an anonymous case (*c*), and there put on the ground that the judgment creditor does not trust to the credit of the estate.

(*z*) *Selby* v. *Pomfret*, 3 De G. F. & J. 595; *post*, p. 1258.

(*a*) 2 P. Wms. 491.

(*b*) It is obvious that the meaning is that a judgment creditor shall not tack to a precedent mortgage his judgment, &c.

(*c*) 2 Ves. Sen. 662.

In *Ex parte Knott* (*d*), Lord Eldon explained that a mere judgment creditor, though he deals originally for a lien, does not get an estate originally in the land; he has neither *jus in re*, nor *jus ad rem;* he is therefore entitled only as a judgment creditor to an *elegit*, and cannot tack. And it may be inferred from the judgment in *Whitworth* v. *Gaugain* (*e*), that the law in this respect remains unaltered by 1 & 2 Vict. c. 110; for if the effect of the judgment is only to charge the interest which the debtor has remaining in him, the creditor can have no right by means of tacking to cut out an incumbrance which preceded his judgment. It has been held that a judgment creditor had not, merely by virtue of 1 & 2 Vict. c. 110, s. 13, such an interest in the lands of his debtor as to enable him to tack a subsequent mortgage (*f*).

Effect of stat. 27 & 28 Vict. c. 112.

Inasmuch as, under the stat. 27 & 28 Vict. c. 112, no judgment, statute, or recognizance affected land until the land had been actually delivered in execution, it is clear that the right to tack a judgment to a first mortgage could not arise until such delivery in execution. And inasmuch as under the Land Charges Act, 1900, no judgment or recognizance is now a charge on land until the writ or order enforcing it is registered, it is clear that there is no right to tack a judgment to a first mortgage until such registration. It does not seem that even after registration there is anything in this Act to improve the position of a judgment creditor in this respect over that which he held under the stat. 1 & 2 Vict. c. 110, or to make any alteration as to what may be taken in execution, that is to say, the debtor's interest in the land subject to the prior equities; it is conceived that the creditor can take that interest only, and thus cannot get rid of the mesne incumbrances by getting in a first legal mortgage. The point may, it is thought, be regarded as now settled, notwithstanding former doubts on the point (*g*).

(*d*) 11 Ves. 619. And see *Stephenson* v. *Hayward*, Prec. Ch. 810; *Breerton* v. *Jones*, 1 Eq. Ca. Abr. 326.

(*e*) 3 Ha. 416.

(*f*) See *Benham* v. *Keane*, 3 De G. F. & J. 318.

(*g*) Mr. Fisher (Mortgages (4th ed.), p. 566) was of a contrary opinion, on the ground that the stat. 1 & 2 Vict. c. 110 puts the judgment creditor on the footing of an equitable incumbrancer, formerly as from the time when he obtained his judgment, and now from the time when his charge is perfected. It is to be observed, however, that neither Act puts the creditor in that position as from the time at which the debt was incurred, at which time it cannot be said that the creditor relied on the land for payment. See *Re Moon*, (1907) 2 Ch. 304.

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Third rule. First mortgagee may tack further advances on statute or judgment.

The *third* rule in *Brace* v. *The Duchess of Marlborough* (*h*) is, that if a first mortgagee lends a further sum to the mortgagor upon a statute or judgment, he shall retain against a mesne mortgagee until both his securities are satisfied.

Reason for the rule.

The reason for the rule, as given by Sir J. Jekyll, M. R., in this case is, that "it is to be presumed that the mortgagee lent his money on the statute or judgment as knowing that he had hold of the land by the mortgage, and in confidence lent the further sum on a security which, though it passed no present interest in the land, yet must be admitted to be a lien thereon." In other words, the justification for the rule is, that the mortgagee, having originally lent on the credit of the estate, and having made his further advance on the security of a judgment giving him an inchoate charge (which he may at any time perfect by registration), must be deemed to have continued to look to that credit for repayment of his further advance, unlike a simple contract creditor, who cannot be presumed, at the time he lent his money, to have done so on the credit of the land, so as to entitle him to tack his judgment to a prior legal mortgage.

Rule applies to tacking subsequent incumbrances.

The rule applies with even greater force where the further advance is made on the security of a subsequent mortgage or charge, and so necessarily on the security of the land, than when it is made on a statute or judgment (*i*).

Further security must be in writing.

The security for the further advance must be in writing; for though an equitable mortgage may be made by mere deposit of deeds, the principle does not apply where the deeds are already in the possession of the lender as legal mortgagee (*k*).

Principle of the rule.

This rule results from the doctrine already noticed, viz., where equities are equal, the law shall prevail. But this principle will not apply unless the first mortgagee has the legal estate, or the better right to call for it; for otherwise, as hereafter noticed (*l*), the incumbrancers, whether by mortgage, judgment, statute, or recognizance, will be payable according to the priority of their respective incumbrances; nor will it apply if the first mortgagee had notice of the mesne incumbrance at

(*h*) 2 P. Wms. at p. 491. See *Shepherd* v. *Titley*, 2 Atk. 348; *Bedford* v. *Backhouse*, 2 Eq. Ca. Abr. 615; *Anon.*, 2 Ves. Sen. 662.

(*i*) *Gordon* v. *Graham*, 2 Eq. Ca. Abr. 598; *Morret* v. *Paske*, 2 Atk. 52; *Godfrey* v. *Tucker*, 33 Beav. 280; *Wyllie* v. *Pollen*, 11 W. R. 1081.

(*k*) *Exp. Hooper*, 1 Mer. 7.

(*l*) *Post*, pp. 1263 *et seq.*

the time of making the further advance (*m*), or if it was made *pendente lite* (*n*), the suit being duly registered.

First mortgagee must have legal estate, or best right to call for it.

First, then, a first mortgagee, in order to entitle him to tack a further advance as against mesne incumbrancers, must either actually have the legal estate, or must have the best right to require it to be conveyed to him. What will put a mortgagee in this position has been already considered (*o*).

First mortgagee must not have notice.

Secondly, in order to give a first mortgagee the right to tack a further advance, he must at the time of making such advance have had no notice of the mesne incumbrances.

Hopkinson v. *Rolt.*

Although a mortgage is expressly made to secure the sum then lent, and also further advances, and although the second mortgage is made to another person, with notice of the first, yet if the further advances are made by the first mortgagee with notice of the second, the first mortgagee cannot tack such advances against the second (*p*). And the doctrine applies as well to a case where the prior mortgagee has covenanted to make the further advances as to a case where the further advances are voluntary (*q*). Nor does it make any difference that the mortgagee when making the further advances stipulates for further security (*r*).

But a mortgagee under a mortgage for further advances who was also the mortgagor's executor and a guarantor for him, was entitled after the mortgagor's death to tack to his mortgage the amount which he was called upon to pay under the guarantee (*s*).

Where the first mortgage is to trustees as joint tenants on a joint account, notice to one of them of a second mortgage is sufficient to displace their right to tack a further advance (*t*).

A purchaser with notice of a mortgage or deposit to cover future advances is not bound to inquire whether any future

(*m*) *Lloyd* v. *Attwood*, 3 De G. & J. 612.

(*n*) *Morret* v. *Paske*, 2 Atk. 53.

(*o*) *Ante*, p. 1245.

(*p*) *Shaw* v. *Neale*, 6 H. L. C. 581, 608; *Hopkinson* v. *Rolt*, 9 H. L. C. 514; *Williams* v. *Owen*, 13 Sim. 597; *Blunden* v. *Desart*, 6 H. L. C. 597; *London and County Bank* v. *Ratcliffe*, 6 App. Ca. 722; *Union Bank of Scotland* v. *National Bank of Scotland*, 12 App. Ca. 53. In *Daun* v. *City of London Brewery Co.*, L. R. 8 Eq. 155, it was held that the rule is not excluded by any custom as between brewers and distillers.

(*q*) *West* v. *Williams*, (1899) 1 Ch. 132, C. A.

(*r*) *Hughes* v. *Britannia Bldg. Soc.*, (1906) 2 Ch. 607.

(*s*) *Gannon* v. *Gannon*, (1909) 1 Ir. R. 57.

(*t*) *Freeman* v. *Laing*, (1899) 2 Ch. 355; followed (1903) 1 Ch. 183.

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advances have been made after the mortgagee has notice of the sale (*u*).

Further advances made to a person wrongfully in possession of the equity of redemption may be tacked, if the mortgagee had no notice of the bad title (*x*).

Bank mortgage.

Where a bank, holding a mortgage to secure the balance of a customer's account, receives notice of a second mortgage, it does not affect the nature of the security. It remains a security for the balance from moment to moment. But it puts a limit to the amount of the security. It cannot be increased beyond the balance at the date of the notice, but it may be diminished. If the debit balance is at any moment brought lower than this by subsequent payments, the secured amount is correspondingly reduced, and once reduced it cannot be raised again (*y*).

Further advance made *pendente lite* cannot be tacked.

As none but a *bonâ fide* purchaser of a puisne incumbrance without notice of intermediate incumbrances can tack it to a prior mortgage, it is obvious that a first mortgagee cannot tack to his mortgage a subsequent incumbrance got in by him, or a further advance made by him *pendente lite*, as the registration of the *lis pendens* would affect him with notice of the intermediate incumbrances (*z*).

Further advances after act of bankruptcy.

A mortgagee is entitled to tack advances made without notice of an available act of bankruptcy, and this appears to have been so even before the Act of 1869 (*z*). Now under the Bankruptcy Act, 1883 (*a*), s. 49, such advances made in the interval between the act of bankruptcy and the receiving order would be protected as a *bonâ fide* dealing.

Mortgagee must claim both mortgages in the same right.

An exception to the rule under consideration, however, prevails, if the first mortgagee takes the assignment of a subsequent mortgage as a trustee for another person; in which case he shall not be allowed to tack the mortgages, for if he might, then a mere stranger purchasing the third mortgage, and declaring he had bought it in trust only for the first mortgagee, might tack both together, and defeat all the other incum-

(*u*) *London and County Bank* v. *Ratcliffe*, *sup.*

(*x*) *Young* v. *Young*, L. R. 3 Eq. 801, *sed qu.*

(*y*) *Deeley* v. *Lloyds Bank*, (1910) 1 Ch. 648, per Fletcher Moulton, L. J.

(*z*) *Morret* v. *Paske*, 2 Atk. 52, 53; *Collet* v. *De Gols*, Cas. t. Talb. (Williams) 65; *Foxcroft* v. *Devonshire*, 2 Burr. 938.

(*a*) 46 & 47 Vict. c. 52, s. 49. See *ante*, p. 612.

brancers (*b*). Similarly (*c*), the executors of a first mortgagee who had the legal estate in his own right, cannot, as against a mesne incumbrancer, tack a mortgage of the equity of redemption, which had vested in their testator as the executor of another. It is just the same as if the estates were in two different persons.

But the prior mortgagee may tack under a deed which secures a debt of his own, though it also contains trusts for others (*d*). And the right to tack exists where the mortgagee, though trustee of one debt, has a beneficial interest in it (*e*).

A mortgagor cannot, of course, be allowed, either directly or through the intervention of another person, to defeat the rights of creditors whose incumbrances he has himself created. So, where a first mortgage, and a subsequent charge in favour of the same mortgagee to secure a further advance, had, on being paid off, been kept alive and transferred to a trustee for the mortgagor, it was held that the trustee stood in the position of his *cestui que trust*, and could not prejudice the rights of mesne incumbrancers by tacking as against them any more than the *cestui que trust* himself could (*f*).

Whether judgment creditor may tack subsequent security against mesne incumbrancers.

The question as to whether a prior judgment creditor can tack a subsequent security so as to squeeze out mesne incumbrancers would seem not to be quite free from doubt. The case of *Smithson* v. *Thompson* (*g*) is sometimes relied upon as an authority, at all events under the old law, in favour of an answer in the affirmative; but it is to be observed that, in that case, there were two successive judgments and a mortgage, and it does not appear from the report that the first judgment creditor had proceeded to execution so as to acquire the legal estate by virtue of his judgment, nor does it appear that the mortgage was not a legal mortgage; so that it is quite possible that the first judgment creditor may have acquired the legal estate by virtue of his mortgage, in which case his mortgage and his judgment had priority over the second judgment quite irrespective of tacking.

(*b*) *Morret* v. *Paske*, 2 Atk. 52; *Shaw* v. *Neale*, 6 H. L. C. 581; *Spencer* v. *Pearson*, 24 Beav. 266; *Bates* v. *Johnson*, Johns. 304.

(*c*) *Barnett* v. *Weston*, 12 Ves. 130. And see *Lewis* v. *Morgan*, 5 Pri. 155.

(*d*) *Spencer* v. *Pearson*, *sup.*

(*e*) *Price* v. *Fastnedge*, Amb. 685; *Blackwell* v. *Symes*, cited *ibid.*; *Re Raggett*, 16 Ch. D. 117.

(*f*) *Ledbrook* v. *Passman*, 57 L. J. Ch. 855.

(*g*) 1 Atk. 520.

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It would seem that neither the interest given under 1 & 2 Vict. c. 110, nor a registered charge under the Land Charges Act, 1900, would of itself be sufficient, without actual execution, to enable a judgment creditor to tack a subsequent mortgage.

Upon the principle that no security or debt can be tacked to a prior legal mortgage, unless it is a lien on the land (*h*), a mortgagee is not entitled to charge in account against the mortgagor further advances secured by bond, or to tack the bond debt as against mesne incumbrancers, whether by mortgage, judgment, or statute (*i*). But a bond debt may be tacked as against the heir or beneficial devisee (*k*), and a simple contract debt against the executor (*l*).

The same principle applies *à fortiori* to further advances which are simple contract debts, in respect of which the mortgagee cannot tack against creditors but must rely on his ordinary remedies for enforcing payment of such a debt, and, in case of the bankruptcy of his debtor or the administration of his assets after his death, must come in rateably with other creditors of equal degree (*m*).

Fourth rule. No tacking where legal estate is outstanding.

The last rule in *Brace* v. *Duchess of Marlborough* (*n*) is as follows: "It appearing that a puisne incumbrancer had bought in a prior mortgage, in order to unite the same to the puisne incumbrance, but it being proved that there was a mortgage prior to that, the Court clearly held that the puisne incumbrancer, where he had not got the legal estate, or where the legal estate was vested in a trustee, could there make no advantage of his mortgage: but in all cases where the legal estate is standing out, the several incumbrances must be paid according to their priority in point of time: *Qui prior est in tempore, potior est in jure*." This rule, that tacking will not be allowed where the legal estate is outstanding, is a corollary to the general rule that the priorities of equitable incumbrances on real estate are regulated by order of date (*o*).

(*h*) *Ante*, p. 1252.

(*i*) *Morret* v. *Paske*, 2 Atk. 54. See *Rolfe* v. *Chester*, 20 Beav. 613; *Thomas* v. *Thomas*, 22 Beav. 341.

(*k*) Chap. LIV., Sect. II. (iv).

(*l*) *Ibid.* (v).

(*m*) In bankruptcy all debts proved, with exceptions as to debts secured by mortgage, charge, or lien, and other debts to which priority is given by statute, are payable *pari passu*. See 46 & 47 Vict. c. 52, s. 40. By the stat. 32 & 33 Vict. c. 46, in the administration of the assets of deceased persons, specialty and simple contract debts are treated as being of equal degree.

(*n*) 2 P. Wms. at p. 495.

(*o*) See this rule considered *post*, pp. 1263 *et seq.*

iii.—Tacking against Sureties.—In a recent case (*p*) where a mortgagee acquired the right to tack by the same deed by which the defendant became surety, it was held by Byrne, J., reluctantly following *Farebrother* v. *Wodehouse* (*q*), that the mortgagee could at the same time sue for payment of the debt from the surety and set up his right to tack or consolidate against the right of the surety to a transfer of the securities, whatever might be the case if the surety instituted proceedings to redeem.

Where a man mortgages his estate, and a surety mortgages another estate, to secure a mortgage debt, and the principal makes a second mortgage of his estate to the same mortgagee for another sum, the surety is entitled to redeem the first mortgage on payment of the first mortgage debt only, and the mortgagee is not entitled to tack the second mortgage (*r*); and the same result follows whether there is or is not a provision that the mortgagee shall resort to the principal's estate first (*s*).

But it was held in *Williams* v. *Owen* (*t*), that if a further charge is afterwards made by the mortgagor in favour of the same mortgagee, the surety cannot, on paying off the first charge, call for an assignment of the mortgage security without redeeming the further charge (*t*), unless a right of redemption is given him (*t*). But *Williams* v. *Owen* is no longer law (*u*). It was said by the Master of the Rolls in *Farebrother* v. *Wodehouse* (*x*), that Lord Cranworth, in *Bowker* v. *Bull*, had regard to the special contract in that case; this, however, is not so, for that case was decided on the broad principle that the mortgagee, when he made his further advance, had notice of, and was bound by, the right of the surety to the first security.

So if the mortgagee's right to make a further advance be affected by notice of a mesne incumbrance, such notice will not only prevent him from tacking as against that incumbrance, but will also entitle the surety to the benefit of the security, on payment of the original advance alone (*y*).

(*p*) *Nicholas* v. *Ridley*, (1904) 1 Ch. 192.
(*q*) 23 Beav. 18.
(*r*) *Bowker* v. *Bull*, 1 Sim. N. S. 29.
(*s*) *Ibid.* And see *Jones* v. *Smith*, 2 Ves. Jun. 372; *Aldworth* v. *Robinson*, 2 Beav. 287.
(*t*) *Williams* v. *Owen*, 13 Sim. 597.
(*u*) *Nicholas* v. *Ridley*, *sup.*
(*x*) 23 Beav. 18.
(*y*) *Drew* v. *Lockett*, 32 Beav. 499.

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The true principle, however, seems to be, not one of tacking at all, but that the creditor is bound to keep the security intact for the benefit of the surety, and not burthen it with further advances (*z*).

Section III.

Priority as between Equitable Mortgages of Land.

Doctrine of priority by notice not applicable to equitable mortgages of land.

i.—Notice not applicable to Land.—The doctrine (*a*) that priority is gained by notice given to the legal holder of property, which applies to equitable interests in pure personalty, and to choses in action, is not applicable to equitable interests in land, or such personalty as is in equity real estate, as to which no priority is gained by giving notice to the trustee or other person in whom the legal estate is vested, and the doctrine has been held not to apply as between successive equitable sub-mortgagees (*b*), nor to an assignment in equity of an annuity charged by will upon land (*c*). Although a mortgage debt is a chose in action, yet where the subject of the security is land, the mortgagee is treated as having an interest in land, and priorities are governed by the rules applicable to interests in land, and not by the rules which apply to interests in personalty, and leaseholds are real estate for the purposes of this rule (*d*). So, notice given to a first legal mortgagee will not affect the third mortgagee, who having advanced his money without notice of a second mortgage shall afterwards pay off, and take a transfer of, the first legal mortgage; such third mortgage overrides the second mortgage, though the transfer was made simultaneously with the advance by the third mortgagee (*e*). In like manner, notice given by a third mortgagee, though accompanied with an indorsement on the title deeds of the first mortgage, will not give priority to such third incumbrancer over the second, who has given no notice (*f*).

(*z*) *Forbes* v. *Jackson*, 19 Ch. D. 615, 621.

(*a*) *Ward* v. *Duncombe*, (1893) A. C. at p. 390. As to notice to trustees of mortgaged funds, see *post*, Chap. LVI., Sect. I. (ii).

(*b*) *Jones* v. *Gibbon*, 9 Ves. 407; *Exp. Mackay*, 1 M. D. & De G. 550; *Hopkins* v. *Hemsworth*, (1898) 2 Ch. 347.

(*c*) *Wiltshire* v. *Rabbits*, 14 Sim. 76; *Rochard* v. *Fulton*, 1 J. & L. 413.

(*d*) *Taylor* v. *London and County Bank*, (1901) 2 Ch. 231, C. A.

(*e*) *Peacock* v. *Burt*, 4 L. J. (N. S.) Ch. 33.

(*f*) *Jones* v. *Jones*, 8 Sim. 633.

But priority will be gained by notice given by the later of two equitable incumbrancers of trust money produced by sale of real estate; and the same rule will apply if the charges are on a portion to be raised by trustees out of real estate, or on any such interest in land vested in trustees as can only reach the hands of the beneficiary in the shape of money (*g*). The rule also applies to a reversionary interest in the proceeds of sale of land held in trust for sale, but not yet sold (*h*).

Exception as to proceeds of sale of land and portions.

It is not to be inferred, from the circumstance of an assignee of an equitable interest in land acquiring no priority by giving notice to the owner of the legal estate, that it may not be a proper and prudent step to give notice. If, for instance, the legal estate is vested in a first mortgagee, notice should be given in order to prevent his tacking a subsequent charge to his first mortgage, or parting with the legal estate to any other person on being paid off (*i*).

Advisability of giving notice in certain cases.

It is also advisable that a puisne incumbrancer should give notice of his charge to every prior mortgagee, whether legal or equitable, in order to prevent such mortgagee, on an exercise of his express or statutory power of sale, from paying over the surplus proceeds of sale to the mortgagor (*k*).

General rule.

ii.—Priority of Equitable Mortgages of Land regulated by Order of Date.—Where all the incumbrances on real estate or chattels real are equitable, priorities are generally regulated by order of date and not by priority of notice. Where equities are equal, the prior equity prevails: *Qui prior est tempore, potior est jure* (*l*).

This rule applies equally whether the outstanding legal estate is a fee or a term of years (*m*), or a term attendant upon the inheritance (*n*), if not merged by the Satisfied Terms Act (*o*); in which latter case the term will in equity follow all the estates subsisting upon the inheritance.

(*g*) See *post*, p. 1291.

(*h*) *Lloyds Bank* v. *Pearson*, (1901) 1 Ch. 865.

(*i*) Dav. Con. (4th ed.) Vol. II. pt. ii. pp. 231, 232.

(*k*) See *Thorne* v. *Heard*, (1895) A. C. 495.

(*l*) *Beckett* v. *Cordley*, 1 Bro. C. C. 353; *Rice* v. *Rice*, 2 Drew. 73; *Frere* v. *Moore*, 8 Pri. 475; *Isaac* v. *Worstencroft*, 67 L. T. 351. As to priority by registration of mortgages of land in Middlesex and Yorkshire, and in Ireland, see *post*, p. 1267.

(*m*) *Exp. Knott*, 11 Ves. 63.

(*n*) *Charlton* v. *Low*, 3 P. Wms. 330.

(*o*) 8 & 9 Vict. c. 112. A term which was already attendant might before this Act have been clothed with a trust for a mortgagee or purchaser.

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An equitable incumbrancer on land is not bound to give any notice, and is not postponed by any absence of activity in asserting his rights, unless his acts amount to fraud (*p*).

In reference to the general rule as to the priority of equitable incumbrances on real estate, it is necessary to remark, that as between mere equitable claims, equity gives no preference to mortgages, charges, liens, judgments, or recognizances, but they are all payable according to their respective priority of dates (*q*); and even if a judgment creditor obtain legal possession of the lands by his *elegit*, and the tenant attorn, a prior equitable mortgagee or other *specific* incumbrancer will be preferred in equity, and may there enforce his charge, upon the ground that though the judgment creditor has acquired the legal estate, he has no beneficial interest beyond the interest of the debtor himself in the land, viz., the property subject to the prior incumbrance (*r*); and so, after a valid equitable assignment of chattels, a judgment creditor will not be allowed to seize under a *fieri facias* (*s*).

In like manner, in the case of a deposit of title deeds, which are held by the depositor subject to a trust, the lien of the depositee will be postponed to that of the *cestuis que trust* (*t*).

So where a solicitor, being a trustee, fraudulently creates an equitable mortgage by deposit of the trust title deeds, the equity of the innocent *cestui que trust* will prevail over that of the innocent mortgagee (*u*).

Rule only applies where the equities are equal.

In one case, A. being entitled to a legacy charged on real estate devised to B., by a deed to which B. was a party, and which recited the intention to keep the legacy charged on the estate, assigned the legacy to trustees on the trusts of a settlement, and afterwards A., without the concurrence of the

(*p*) *Rooper* v. *Harrison*, 2 K. & J. 86; *Jared* v. *Clements*, (1902) 2 Ch. 399.

(*q*) *Beckett* v. *Cordley*, 1 Bro. P. C. 353; *Symmes* v. *Symonds*, 4 Bro. P. C. 328; *Manningford* v. *Toleman*, 1 Coll. 670; *Rice* v. *Rice*, 2 Drew. 73; *Thorpe* v. *Holdsworth*, L. R. 7 Eq. 139. See *Re Morgan*, *Pillgrem* v. *Pillgrem*, 18 Ch. D. 92, C. A., *ante*, p. 410.

(*r*) *Whitworth* v. *Gaugain*, 3 Ha. 416; *Abbott* v. *Stratten*, 3 J. & L. 603.

(*s*) *Langton* v. *Horton*, 1 Ha. 549.

(*t*) *Cory* v. *Eyre*, 1 De G. J. & S. 149; *Shropshire Union*, *&c. Co.* v. *Reg.*, L. R. 7 H. L. 496, 510; *Taylor* v. *London and County Banking Co.*, (1901) 2 Ch. 231, C. A. And see *Re Champion*, (1893) 1 Ch. 101, C. A.; *Bourke* v. *Lee*, (1904) 1 Ir. R. 280; *Re Bobbett*, (1904) 1 Ir. R. 461.

(*u*) *Bradley* v. *Riches*, 9 Ch. D. 189; *Re Richards*, 45 Ch. D. 589; *Powell* v. *London and Prov. Bank*, (1893) 2 Ch. 555.

trustees, released the charge, and B. conveyed the estate to A. and X. (subject to existing incumbrances), in trust to sell or mortgage, under which first a legal mortgage was created, and secondly an equitable mortgage was made to a judgment creditor, who entered up satisfaction on his judgment in consideration of it; the Master of the Rolls held that the second mortgage had priority to the legacy, on the ground that the equities of the parties were not equal, and therefore that the above rule was inapplicable (*x*). The decision in this case, however, seems open to question, for both parties were equally defrauded and equally innocent, and the release, though operative at law, was inoperative in equity. The trustees of the legacy might, it is true, have put notice of the settlement on the title deeds, but this might not have availed to give notice to the second mortgagee. It is difficult to see in the fact that A. had purported to release the legacy, a reason for giving priority to the second mortgage over the trustees, who were equally innocent and earlier in time (*y*).

Effect of fraud.

The rule "*qui prior est tempore, potior est jure*" applies where a mortgagor has practised a fraud on the prior incumbrancer, by falsely alleging, at the time that the incumbrance is created, that he has already created a charge on the property in favour of a third person, subject to which supposed charge the mortgage is accordingly made, but which charge is in fact created subsequently (*z*).

So where a vendor, after a contract for sale, gave an equitable mortgage to a person without notice of the contract, the purchaser on specific performance was held to be entitled to deduct his costs from the purchase-money in priority to the mortgage (*a*).

If a subsequent equitable incumbrancer, having acquired the legal estate, as under a trust for sale, sells the estate and so parts with the legal estate, he loses his protection, and the purchase-moneys in his hands are subject to priorities according to date (*b*).

The rule that mere equitable claims have priority according

(*x*) *Greenwood* v. *Churchill*, 6 Beav. 314. See *Re French's Estate*, 21 L. R. Ir. 283, C. A.

(*y*) See as to loss of priority by fraud or negligence, *post*, pp. 1319 *et seq.*

(*z*) *Frazer* v. *Jones*, 17 L. J. Ch. 353; *Sober* v. *Kemp*, 6 Ha. 155.

(*a*) *Green* v. *Sevin*, 13 Ch. D. 589.

(*b*) *Rooper* v. *Harrison*, 2 K. & J. 86.

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to date is open to the distinction between an equity and an equitable estate or interest. A mere equity to set aside a deed for fraud or rectify it for mistake is not such an equitable estate or interest; but trust money wrongfully laid out in land, a vendor's lien for unpaid purchase-money, and equitable incumbrances, are interests or estates in the land, and so within the rule (*c*).

In the former case, a claimant with a merely equitable right could, before the Judicature Act, 1873, have had no relief as against a purchaser for value without notice, for equity would take no step whatever as against such a purchaser (*d*); but though this rule is now altered, the defence of purchase without notice would never have availed, and does not now avail where the Court is called upon to make a declaration of priorities between purely equitable claimants, for, as their several conveyances are equally innocent conveyances, the Court cannot interfere in favour of one more than the others, but must apply the general rule that they shall rank according to the date of their respective securities (*e*).

The distinction is, however, still of some importance, for where an application is made for simply equitable relief, the Court has a discretion whether it will grant or refuse that relief, and, therefore, can grant it on such terms as the Court thinks fit to impose; but where a declaration of priorities is asked, no terms of any kind can be imposed (*f*).

In the absence of fraud or estoppel the plea of purchaser for value without notice can only be set up against a prior equitable incumbrancer when the purchaser has the legal estate or the best right to call for it (*g*).

(*c*) *Phillips* v. *Phillips*, 4 De G. F. & J. 208, 218.

(*d*) *Jerrard* v. *Saunders*, 2 Ves. Jun. 454; *Hunter* v. *Walters*, L. R. 7 Ch. 75. See as to the plea of purchase for value without notice, *post*, pp. 1329 *et seq.*

(*e*) *Phillips* v. *Phillips*, *sup.* at p. 215; *Cave* v. *Cave*, 15 Ch. D. 639, 646. See *Stackhouse* v. *Countess of Jersey*, 1 J. & H. 721; *Frazer* v. *Jones*, 17 L. J. Ch. 353.

(*f*) *Portsea Island Building Soc.* v. *Barclay*, (1895) 2 Ch. 298, 308. See *Chapman* v. *Michaelson*, (1909) 1 Ch. 238.

(*g*) *Taylor* v. *London and County Bank*, (1901) 2 Ch. 231.

Section IV.

Priority by Registration of Mortgages of Land.

i.—The Statutes relating to Registration of Deeds, &c. relating to Land.—By the Middlesex Registry Act (*h*), all deeds and wills concerning estates within the county of Middlesex are directed to be registered. And all such deeds are to be adjudged fraudulent and void against any subsequent purchaser or mortgagee for valuable consideration, unless a memorial thereof be registered in the manner thereby prescribed before the registering of the memorial of the deed under which such subsequent purchaser or mortgagee shall claim. But the Act does not now apply to any instrument made after the passing of the Land Charges Act, 1900 (*i*), and capable of registration under that Act or the Land Charges Registration and Searches Act, 1888. Middlesex Registry Acts.

Similar provisions, with some variations, existed with regard to deeds concerning estates within the North, East, and West Ridings of the county of York, or within the town and county of Kingston-upon-Hull (*k*). But by the Yorkshire Registries Act, 1884 (*l*), the earlier Yorkshire Registries Acts are repealed, and the law relating to the registration of deeds and other instruments affecting lands and hereditaments within Yorkshire and Kingston-upon-Hull is consolidated and amended. The repeal is not to affect anything duly done or suffered, or any right or liability acquired or incurred under any enactment so repealed prior to the commencement of the Act (*m*). Yorkshire Registries Act, 1884.

The present Act provides (*n*) that all deeds and assurances of such lands, &c., with certain exceptions, executed after the commencement of the Act may be registered in manner thereby prescribed. No period is limited by this Act or by the amending Act of 1885 (*o*), within which assurances are to be registered. Assurances entitled to be registered are to have priority

(*h*) 7 Anne, c. 20, s. 1. This Act has been amended and partially repealed by the Lands Registry (Middlesex Deeds) Act, 1891 (54 & 55 Vict. c. 64), but not so as to affect the provisions stated in the text.
(*i*) 63 & 64 Vict. c. 26, s. 4.
(*k*) 2 & 3 Anne, c. 4; 6 Anne, c. 35; 8 Geo. II. c. 6.
(*l*) 47 & 48 Vict. c. 54.
(*m*) The 1st January, 1885.
(*n*) Sect. 4.
(*o*) 48 & 49 Vict. c. 26.

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according to the date of registration, not according to the date of such assurances or of their execution. The Act does not interfere with priorities as between themselves of assurances registered on the same day (*p*).

Registration under the Land Transfer Acts, 1875 and 1897, supersedes registration in the Middlesex and Yorkshire registries (*q*).

Bedford Level Registry.

By the Bedford Level Act (*r*), all conveyances and charges, except leases for seven years, of the 95,000 acres comprised in the Act are required to be registered. But unregistered conveyances and charges of such lands are nevertheless valid for all purposes except for the purpose of entitling the grantees to the privileges conferred by the Act (*s*).

Registry in Ireland.

The Irish Act (*t*) contains similar enactments, and also the further important provision that every deed or conveyance, a memorial whereof shall be duly registered, shall be good and effectual both at law and in equity according to the priority of time of registering the memorial, and according to the right and interest of the persons conveying. An unregistered charge will therefore be postponed to a subsequent registered one without notice (*u*).

By the Registration of Title (Ireland) Act, 1891 (*x*), local registries of title to land in Ireland have been established in that part of the United Kingdom. Such registration is made compulsory in the case of lands sold under the Land Purchase Acts: but any other lands may be voluntarily registered under this Act, and, if so registered, are exempted from the operation of the earlier Act as to registration of deeds, &c. relating to land in Ireland.

Exemption from local registration of documents registered under Land Transfer Act, 1875.

The Land Transfer Act, 1875 (*y*), exempts land registered under it from and after the date of registration from the jurisdiction of the local registries for Middlesex, the West, North, and East Ridings of Yorkshire, and the town and county of Kingston-upon-Hull; and no document relating to any such

(*p*) 47 & 48 Vict. c. 54, s. 14, as amended by 48 & 49 Vict. c. 54, s. 4. But see *inf.* p. 1273.

(*q*) 38 & 39 Vict. c. 87, s. 127.

(*r*) 15 Car. II. c. 17. By subsequent local Acts parts of such lands have been exempted from the operation of the principal Act.

(*s*) *Willis* v. *Brown*, 10 Sim. 127.

(*t*) 6 Anne, c. 2, s. 4. See *Warburton* v. *Loveland*, 6 Bli. N. S. 1.

(*u*) *Fullerton* v. *Provincial Bank of Ireland*, (1903) A. C. 309.

(*x*) 54 & 55 Vict. c. 66.

(*y*) 38 & 39 Vict. c. 87, s. 127. The provisions of this Act as to the creation and registration of mortgages thereunder are set out *ante*, pp. 43 *et seq.*

registered land executed, and no testamentary instrument relating to any such registered land, coming into operation subsequently to such date as last aforesaid, is required to be registered in any of the said local registries. But this provision does not apply to estates and interests excepted from the effect of registration under a possessory or qualified title, or to an unregistered reversion on a registered leasehold title, or to dealings with incumbrances created prior to the registration of the land (*z*).

Subject to any entry to the contrary on the register, charges on the same land registered under that Act shall, as between themselves, rank according to the order in which they are entered on the register, and not according to the order in which they are created (*a*).

Indian Acts.

Under the Indian Registration Acts, unregistered deeds have no effect, notwithstanding notice, either in India or England (*b*).

Place of registration.

By the Land Registry (Middlesex Deeds) Act, 1891 (*c*), the Middlesex Registry is transferred to the Land Registry established under the Land Transfer Act, 1875 (*d*).

By the Yorkshire Registries Act, 1884 (*e*), three offices for registration of deeds, &c. are established, namely, at Northallerton for the North Riding, at Beverley for the East Riding, and at Wakefield for the West Riding.

Attestation of memorial.

The memorial of registry in Middlesex must be attested by one witness, where practicable, to be a witness to the deed or conveyance (*f*). In Yorkshire the attestation must be by one or more witnesses, one of whom, at least, shall have been a witness to the execution of the deed (*g*). In Ireland, the attestation must be by one witness, who must have been a witness to the execution of the deed (*h*). If a deed affecting land in Ireland is executed in England, the witness attesting the memorial must make a declaration on oath before a commissioner for oaths or a justice of the peace as to such attestation.

Copyholds and leases.

ii.—What Instruments require Registration.—The Acts do not extend (*i*) to assurances of any copyhold estates or to any

(*z*) 60 & 61 Vict. c. 65, Sched. I.
(*a*) Sect. 28.
(*b*) Indian Acts, No. xvi. of 1864; No. xx. of 1866; *Hicks* v. *Powell*, L. R. 4 Ch. 741.
(*c*) 54 & 55 Vict. c. 64, s. 1.
(*d*) 38 & 39 Vict. c. 87.
(*e*) 47 & 48 Vict. c. 54, s. 31.
(*f*) 54 & 55 Vict. c. 64, Sched. I. (2).
(*g*) 47 & 48 Vict. c. 54, s. 6.
(*h*) 6 Anne, c. 25.
(*i*) See as to Middlesex, 7 Anne, c. 20, s. 18; 63 & 64 Vict. c. 26,

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leases at rack-rent, or for a term not exceeding twenty-one years where the actual possession and occupation go with the lease, and the Middlesex Registry Act excepted from its operation any of the chambers in Serjeants' Inn or the Inns of Court or Chancery in Middlesex. It is, however, considered advisable, though not clearly necessary, to register leases of copyholds where leases of freeholds would be registered, the lease being a common law interest (*k*). Since the site of Serjeants' Inn is within the City of London, it is considered that the exception of it from the operation of the Act was an error, and does not imply that assurances of property within the City must generally be registered; and this understanding is commonly acted on in practice (*l*).

Mortgage of leaseholds held for term not exceeding twenty-one years.

Where an assignment of leaseholds is by way of mortgage, in which case it is not generally intended that the actual possession and occupation should go along with the lease, the lease and assignment should be registered, though the lease is for a term not exceeding twenty-one years.

Mortgage by deposit.

An equitable mortgage by deposit of deeds without memorandum is not within the Middlesex and Irish Registry Acts, as there is nothing to register (*m*).

But by sect. 7 of the Yorkshire Registries Act, 1884, it is enacted as follows:—

"Where any lien or charge on any lands within any of the three ridings is claimed in respect of any unpaid purchase-money, or by reason of any deposit of title deeds, a memorandum of such lien or charge, signed by the person against whom such lien or charge is claimed, may be registered by any person claiming to be interested therein (*n*). . . . . And no such lien or charge shall have any effect or priority as against any assurance for valuable consideration which may be registered under this Act, unless and until a memorandum thereof has been registered in accordance with the provisions of this section."

And by sect. 14 of the same Act it is enacted that—

"Subject to the provisions of this Act, all assurances (*o*) entitled

s. 4; as to Yorkshire, 47 & 48 Vict. c. 54, s. 28. The exception was not in the West Riding Act. The Irish Act confines the exception to leases for twenty-one years with actual possession. See 6 Anne, c. 2, s. 14.

(*k*) Sug. V. & P. (14th ed.) p. 732.

(*l*) *Ibid.*

(*m*) *Sumpter* v. *Cooper*, 2 B. & Ad. 226; *Re McKinney's Estate*, Ir. R. 6 Eq. 445. And see *Re Hamilton's Estate*, 9 Ir. Ch. Rep. 512.

(*n*) The omitted part of this section states the requirements of the Act with regard to a memorandum of charge.

(*o*) The expression "assurance"

to be registered under this Act shall have priority according to the date of registration thereof, and not according to the date of such assurance, or of the execution thereof."

The effect of these enactments is that a mortgage by deposit by way of security of deeds relating to land in Yorkshire, unaccompanied by a memorandum of deposit, will be postponed to a subsequent mortgage of the same property which is duly registered, unless the subsequent mortgagee is deprived by "actual fraud" (*p*) of the protection of the Act (*q*).

Equitable incumbrances.

Notwithstanding the word "conveyance" and other expressions in the Act, equitable incumbrances, instruments not under seal, a memorandum of further charge, and agreements for a mortgage, require registration (*r*); and so does a letter undertaking to deposit title deeds (*s*).

Assurances of interests in land.

An assignment of a legacy charged on land has been held not to be within the Acts, and therefore priority cannot be gained by registration thereof as against a prior unregistered assignment (*t*). It has been considered that this case is open to question (*u*); but the principle of the decision was approved and followed in a subsequent case (*x*), in which Sir E. Kay, J., held that the Local Registration Acts are intended to apply only to dealings at law or in equity with the land itself, and, accordingly, that an incumbrancer upon a share in the proceeds of land in Middlesex, devised in trust for sale, could not obtain priority over other incumbrancers upon the share by registering his mortgage deed, but that the priorities of the several incumbrancers ranked according to their respective notices to the trustees.

So a conveyance of an equity of redemption for the benefit of creditors, although registered, has no priority over prior unregistered incumbrances (*y*).

in this Act includes a "memorandum of charge." See sect. 3 of the Act.

(*p*) See the concluding part of sect. 14, set out *inf.* p. 1274.

(*q*) *Battison* v. *Hobson*, (1896) 2 Ch. 403.

(*r*) *Moore* v. *Culverhouse*, 27 Beav. 639; *Neve* v. *Pennell*, 2 H. & M. 170; *Re Wight's Mortgage Trusts*, L. R. 16 Eq. 41; *Credland* v. *Potter*, L. R. 10 Ch. 8. And see *Meek* v. *Bayliss*, 31 L. J. Ch. 448; *Copland* v. *Davies*, L. R. 5 H. L. 358.

(*s*) *Fullerton* v. *Prov. Bank*, (1903) A. C. 309.

(*t*) *Malcolm* v. *Charlesworth*, 1 Keen, 63; *Re Jennings*, 8 Ir. Ch. R. 421; Sug. V. & P. (14th ed.) p. 727.

(*u*) Dav. Conv. (4th ed.) vol. ii. pt. 2, p. 219.

(*x*) *Arden* v. *Arden*, 29 Ch. D. 702.

(*y*) *Jones* v. *Barker*, (1909) 1 Ch. 321.

Registration of wills.

The English County Register Acts provide that wills affecting lands may be registered within the periods therein respectively prescribed, and that wills duly registered shall have priority as against purchasers and incumbrancers according to time of registration (*z*). But if a will is not registered within the prescribed time, an assurance of the land to a purchaser or mortgagee by the devisee shall, if registered before, prevail over an assurance by the heir-at-law (*a*).

The Irish Act (*b*) directs a memorial of wills and devises affecting lands in Ireland to be registered; but there is no provision avoiding unregistered wills against subsequent purchasers or mortgagees, or specifying within what time wills should be registered. A will acquires no priority by being registered (*c*), and it is said that it is not the practice to register wills in Ireland (*d*).

Mortgage by heir where will not registered.

A will not registered within the time allowed by a County Register Act was formerly held inoperative against a subsequent registered mortgage by the heir (*e*). But now, by the Vendor and Purchaser Act, 1874 (*f*), a conveyance by way of sale or mortgage by a devisee or by someone deriving title through him, under a will of land in a register county not registered within the period allowed by law, shall, if registered before, take precedence of, and prevail over, any assurance by the heir-at-law (*g*).

If the devisee be himself the heir, or if the estate be leasehold, a registered purchaser or mortgagee from the heir or executor would be safe without a registry of the will (*h*), and be entitled to priority over an unregistered purchaser or mortgagee from the deceased (*i*).

Mortgage by legatee of leaseholds.

Where money is advanced on the security of leaseholds situate in a register county, which have been bequeathed to the mortgagor by will, the mortgagee should require evidence, in writing, of the assent of the executors to the bequest, and should require the registration of such assent.

(*z*) 7 Anne, c. 20, ss. 1, 14, 15; 47 & 48 Vict. c. 54, s. 11.
(*a*) 37 & 38 Vict. c. 78, s. 8. See *Chadwick* v. *Turner*, L. R. 1 Ch. 310; *Re Weir*, *Hollingworth* v. *Willing*, 58 L. T. 792.
(*b*) Irish, 6 Anne, c. 2, s. 3.
(*c*) *Fury* v. *Smith*, 1 Hud. & B. 735.
(*d*) Dav. Conv. (4th ed.) vol. ii. pt. 2, p. 217.
(*e*) *Chadwick* v. *Turner*, L. R. 1 Ch. 310.
(*f*) 37 & 38 Vict. c. 78, s. 8.
(*g*) See Dart (7th ed.), p. 872.
(*h*) Sug. V. & P. (14th ed.) p. 546.
(*i*) Dav. Conv. (4th ed.) vol. ii. pt. 2, p. 219.

iii.—Priority of Deeds, &c. by Date of Registration.—Mortgages and other assurances of land situate in register counties, or in Ireland, rank as between themselves, as a general rule, according to priority of registration (*k*).

Deeds registered same day.

Of two deeds registered on the same day, that which is denoted by the earlier number will, in the absence of direct evidence to the contrary, be presumed to have been first registered (*l*).

Priority of registered over unregistered deeds.

Registered instruments have priority over unregistered instruments, though of an earlier date, if the owner of the registered instrument had no notice of the earlier unregistered instrument (*m*).

Registration of appointment under power.

The registration of a deed creating a power does not dispense with the necessity of registering an appointment in exercise of the power. So a registered mortgage by a settlor is preferred to a prior unregistered settlement, and to an appointment under a power therein (*n*).

Registration of assignment of lease.

A registered assignment does not make effectual an unregistered lease (*o*); but where the lease is registered, and so prior to an earlier unregistered settlement, the assignment of the lease, though unregistered, is also prior to the settlement (*p*).

Effect of registration of mortgage.

The registration by the mortgagee protects the equitable title of the mortgagor, and prevents the lessee of the former from claiming a title adversely to the latter (*q*).

Informal registration.

No priority is gained by an informal registration (*r*).

Clerical error.

A mere clerical error in the memorial, if not calculated to mislead, will not vitiate the registration (*s*).

Legal estate.

Registered deeds, conveying the legal estate, have priority over prior registered equitable conveyances, if the conveyance with the legal estate was obtained without notice of the prior equitable assurance (*t*). Both being registered, the legal estate

(*k*) *Doe* v. *Allsop*, 5 B. & Ald. 142.

(*l*) *Neve* v. *Pennell*, 2 H. & M. 170.

(*m*) *Re Wight's Mtg. Trusts*, L. R. 16 Eq. 41; *Rolland* v. *Hart*, L. R. 6 Ch. 678; *Credland* v. *Potter*, L. R. 10 Ch. 8; *Fullerton* v. *Provincial Bank of Ireland*, (1903) A. C. 309.

(*n*) *Scrafton* v. *Quincey*, 2 Ves. Sen. 413. And see *Warburton* v. *Loveland*, 6 Bli. N. S. 1; *Att.-Gen.* v. *Pickard*, 3 M. & W. 571.

(*o*) *Honeycomb* v. *Waldron*, 2 Stra. 1064; *Jack* v. *Armstrong*, 1 Hud. & B. 727.

(*p*) *Warburton* v. *Loveland*, 6 Bli. N. S. 1.

(*q*) *Ball* v. *Lord Riversdale*, Beat. 550.

(*r*) *Jack* v. *Armstrong*, 1 Hud. & B. 727.

(*s*) *Wyatt* v. *Barwell*, 19 Ves. 435.

(*t*) *Morecock* v. *Dickens*, Amb. 678; *Cator* v. *Cooley*, 1 Cox, 182; *Underwood* v. *Lord Courtown*, 2 Sch. & L. 41, 64; *Pentland* v. *Stokes*,

prevails, in the absence of notice; *secus*, if the registered incumbrancer had notice at the time of the advance (*u*).

Postponement of registered security.

Where there are several incumbrancers in a certain order on property in a register county, and the second is prior to the first, but postponed to the third, the third is, to the extent of the interest of the second, paid in priority to the first; the second carries up the third, as it was said in a similar case in Ireland, "upon its back" (*x*).

Further advance without notice.

A first mortgagee advancing more money on the security, after a second mortgage, which had been registered, but of which he had no notice, shall have priority over such second mortgagee in respect of the advances so made (*y*).

Notice of unregistered deed binds in equity.

Although a deed first registered absolutely prevailed at law over deeds subsequently registered or unregistered (*z*), yet, in equity, it has been repeatedly held that a mortgagee or purchaser derives no advantage by the registration of his deed against a prior unregistered instrument of which he has notice (*a*).

Exception as to Yorkshire.

But as regards assurances of land in Yorkshire, sect. 14 of the Act of 1884 (*b*) enacts that—

> "All priorities given by this Act shall have effect in all Courts, except in cases of actual fraud (*c*), and all persons claiming thereunder any legal or equitable interests shall be entitled to corresponding priorities, and no such person shall lose any such priority merely in consequence of his having been affected by actual or constructive notice, except in cases of actual fraud."

Where property is assigned subject to equitable mortgages and the assignment is registered before the equitable mortgages, the question as to priority of registration does not arise, and the assignment is postponed to the mortgages (*d*).

2 Ba. & Be. 75, 300, 321; *Wiseman* v. *Westland*, 1 Y. & J. 117; *Re Russell Road Purchase Moneys*, L. R. 12 Eq. 78, appealed from, but compromised, L. R. 12 Eq. 86.

(*u*) *Benham* v. *Keane*, 3 De G. F. & J. 318; *Ford* v. *White*, 16 Beav. 120.

(*x*) *Sparrow* v. *Cooper*, 1 T. Jones, 72; *Murtagh* v. *Tisdall*, 1 Fl. & K. 20. See *Benham* v. *Keane*, *sup.*

(*y*) *Bedford* v. *Backhouse*, 2 Eq. Ca. Abr. 615, pl. 12; *Wrightson* v. *Hudson*, 2 Eq. Ca. Abr. 609, pl. 7. See *Re O'Byrne's Estate*, 15 L. R. Ir. 373.

(*z*) *Doe* v. *Allsop*, 5 B. & Ald. 142.

(*a*) *Le Neve* v. *Le Neve*, 3 Atk. 646, 652; *Bushell* v. *Bushell*, 1 Sch. & L. 103; *Biddulph* v. *St. John*, 2 Sch. & L. 521; *Jolland* v. *Stainbridge*, 3 Ves. 478; *Wyatt* v. *Barwell*, 19 Ves. 435; *Cheval* v. *Nichols*, Stra. 664 (case of an unregistered annuity); *Trinidad Asphalte Co.* v. *Corryat*, (1896) A. C. 587, P. C.

(*b*) 47 & 48 Vict. c. 54.

(*c*) See *Battison* v. *Hobson*, (1896) 2 Ch. 403.

(*d*) *Jones* v. *Barker*, (1909) 1 Ch. 321.

It has been held that the expression "actual fraud" in this section means fraud carrying with it grave moral blame, and not mere constructive fraud, as where a solicitor mortgagee took advantage of a defect in a prior mortgage given by his client to another person, in order to claim priority for his own mortgage (*e*).

Meaning of "actual fraud."

Even as regards lands in Middlesex, the notice must be actual, clear, and distinct, amounting, in fact, to fraud (*f*); suspicion of notice is not sufficient to induce the Court to break in upon the statute (*g*). Clear constructive notice, however, as notice to the solicitor of the purchaser or mortgagee in the same transaction, may for this purpose be regarded as actual notice to the purchaser, mortgagee or client himself (*h*). But such constructive notice as a *lis pendens* is not sufficient (*i*), nor notice of a tenancy (*k*).

What notice sufficient.

Distinct notice to the agent or trustee is actual notice to the principal, and has been held sufficient (*l*).

Notice to agents, &c.

The entire equitable doctrine of notice (*m*) is founded on the imputation of fraud; and after the Courts have once admitted the doctrine of "constructive fraud" for the purpose of defeating a title, it seems impracticable to attempt a distinction in the particular case of the Registry Acts. This doctrine is now, as has been seen above, excluded as regards Yorkshire.

Principle of notice.

If a mortgagee of land in Middlesex had no notice of a prior unregistered title when he took his security, he may, after notice, protect himself by registration (*n*). And, on general principles, a mortgagee having no notice of an unregistered conveyance would be equally protected by registration of a security upon the faith of which the money was advanced, though in the meanwhile he had acquired notice (*o*).

Notice after taking security.

The registration of an instrument in the Middlesex Registry is not of itself notice so as to affect a puisne incumbrancer

No notice by registration in county of Middlesex.

(*e*) *Battison* v. *Hobson*, (1896) 2 Ch. 403.

(*f*) *Jolland* v. *Stainbridge*, 3 Ves. 478; *Wyatt* v. *Barwell*, 19 Ves. 435; *Chadwick* v. *Turner*, L. R. 1 Ch. 310.

(*g*) *Hine* v. *Dodd*, 2 Atk. 275.

(*h*) Conv. Act, 1882, s. 3; and see and consider *Agra Bank* v. *Barry*, L. R. 7 H. L. 135, where the question of imputing the knowledge of a solicitor to his client is fully discussed.

(*i*) *Wyatt* v. *Barwell*, 3 Ves. 478; *Wallace* v. *Donegal*, 1 Dr. & Wal. 461.

(*k*) *Popham* v. *Baldwin*, 2 Jones, Ir. Exch. 320.

(*l*) *Le Neve* v. *Le Neve*, 3 Atk. 646. And see *post*, p. 1350.

(*m*) See as to notice as affecting priorities, *post*, pp. 1325 *et seq.*

(*n*) *Essex* v. *Baugh*, 1 Y. & C. C. C. 620.

(*o*) See *Elsey* v. *Lutyens*, 8 Ha. 159 (case of settlement).

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with knowledge of the existence of a prior registered charge, and so prevent him from protecting himself by getting in the legal estate (*p*). So, also, registration is not notice to the mortgagor of an assignment of the mortgage; and consequently, if after an assignment, which is registered, payments are made by the mortgagor to the mortgagee without notice of the registered assignment, they must be allowed in account by the assignee (*q*).

Search of register.

If, however, an incumbrancer is shown to have searched the register, he will be fixed with constructive notice of any prior charges appearing therein (*r*), unless the presumption is rebutted by showing that the search was made only from a certain date later than that of the registered deeds relating to the charges (*s*). A mortgagee is not bound to search the register (*t*), nor to make inquiries with a view to the discovery of unregistered instruments (*u*).

Omission to search.

It seems, however, that a purchaser or mortgagee who omits to search the registry in Yorkshire will be deemed to have constructive notice of what he would have found on search (*x*).

As to registration in county of York.

By the Yorkshire Registries Act, 1884 (*y*), s. 15, the registration of an instrument was made actual notice to all persons and for all purposes whatsoever. This section was repealed by the Amendment Act of 1885 (*z*); but having regard to the provisions of sects. 14 and 16 of the Act of 1884, to the effect that assurances are to have priority in order of registration, and that protection by legal estate and tacking are disallowed, the practical effect is that the general rule that a purchaser or mortgagee who obtains the legal estate is not affected by a prior equitable charge which is duly registered, but of which he has no notice *aliunde*, does not apply to Yorkshire (*a*).

As to registration in Ireland.

In Ireland, registration is of itself not notice (*b*), though by the Irish Registry Act (*c*) the priority of assurances of land

(*p*) *Cator* v. *Cooley*, 1 Cox, 182; *Wiseman* v. *Westland*, 1 Y. & J. 117; *Ford* v. *White*, 16 Beav. 120; *Lane* v. *Jackson*, 20 Beav. 535; *Re Russell Road Purchase*, L. R. 16 Eq. 78.

(*q*) *Williams* v. *Sorrell*, 4 Ves. 389.

(*r*) *Proctor* v. *Cooper*, 2 Drew. 1.

(*s*) *Hodgson* v. *Dean*, 2 S. & St. 221; *Ford* v. *White*, 16 Beav. 120.

(*t*) *Lane* v. *Jackson*, 20 Beav. 535.

(*u*) *Agra Bank* v. *Barry*, L. R. 7 H. L. 135.

(*x*) *Manks* v. *Whiteley*, (1912) 1 Ch. 735, C. A.

(*y*) 47 & 48 Vict. c. 54.

(*z*) 48 & 49 Vict. c. 26, s. 5.

(*a*) See *Manks* v. *Whiteley*, *sup.*

(*b*) See *Bushell* v. *Bushell*, 1 Sch. & L. 90; *Underwood* v. *Lord Courtown*, 2 Sch. & L. 41; *Pentland* v. *Stokes*, 2 Ba. & Be. 75.

(*c*) 6 Anne, c. 2.

by way of mortgage or otherwise is determined according to priority of registration, independently of the question of notice (*d*).

In a case (*e*) in which Lord Redesdale ultimately decided that persons claiming under articles for a settlement were entitled by virtue of priority of registration as against persons claiming by virtue of a subsequent legal settlement, his lordship remarked as follows:—"The registry is considered as notice to a certain extent; no person thinks of purchasing an estate without searching the registry; and, if he searches, he has notice; but I think it cannot be notice to all intents, on account of the mischief that would arise from such a decision. For, if it is to be taken as constructive notice, it must be taken as notice of everything that is contained in the memorial; if a memorial contains a recital of another instrument, it is notice of that instrument; if of a fact, it is notice of that fact." And in another case (*f*) he observed, "that it seemed to him that nothing could be more mischievous than to hold that the putting anything on the registry is notice, within the meaning of the word notice as applied to Courts of equity in such cases."

Necessity for registration.

Although the protection afforded by the registry is far from perfect, assurances affecting lands within the local limits must of course be registered, and that as speedily as possible after their execution, in order to prevent their due priority from being intercepted by a hitherto unregistered purchaser, or by a subsequent purchaser using greater diligence; and it is obvious that, where the interest dealt with is of such a description as to render it doubtful whether registration is required or not, the safe course will be to register; though no priority will be acquired by so doing, if it should be held that the Registry Acts do not apply. Even were it clear that the statute does not apply, it might be advantageous to register with a view to giving to persons who afterwards search the register notice of the registered incumbrance (*g*).

An unregistered mortgage by a married woman of her separate equitable leaseholds is prior to a subsequent deed duly registered by which she charged her "separate estate" with

(*d*) *Ante*, p. 1268.

(*e*) *Bushell* v. *Bushell*, 1 Sch. & L. 90, at p. 103; *Lord Dunsany* v. *Latouche*, 1 Sch. & L. 137, 161.

(*f*) *Underwood* v. *Lord Courtown*, 2 Sch. & L. 41, at p. 64.

(*g*) Dav. Conv. (4th ed.) vol. ii. pt. ii. p. 221.

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a debt (*h*); the deed only affected what she could rightly charge (*h*).

Rectifying registration.

Where a registered deed is set aside for fraud, the Court has, in Middlesex, power to vacate the registration (*i*). But the Yorkshire Registries Act, 1884 (*k*), provides that fraudulent dispositions of land and charges on land shall be void, notwithstanding registration, and that the Court may rectify the register by cancelling entries. And generally the registration of a land charge (*l*) or of a writ or order affecting land (*m*) may be vacated pursuant to an order of the High Court.

Registration of forged mortgage.

A registered mortgage by a son and heir, personating his father of the same name, is a forgery, and void against the devisees under an unregistered will (*n*).

Distinction between English and Irish Registry Acts.

It may be proper in this place to make a few observations tending more particularly to distinguish between the operation of the Registry Acts of England and Ireland; and with that view it may be first remarked, that the two sets of Acts agree in the following respects, viz., that registry itself is not notice (*o*); that deeds take effect *inter partes* and their representatives, although not registered, for the Registry Acts do not make registration imperative, but leave it at the option of the parties; and that in Middlesex and Ireland, but now not in Yorkshire, notice of a prior unregistered deed will prevent the priority of a subsequent registered deed (*p*).

But as between two registered deeds for good consideration without notice, this difference exists, viz., that in Middlesex, as formerly also in Yorkshire, a registered deed conveying the *legal estate* will have preference over a prior registered equitable conveyance, if such subsequent conveyance was obtained without notice of the prior equitable assurance (*q*), and a prior legal mortgagee, duly registered, advancing a further sum without actual notice of a puisne incumbrance (*r*), or an equit-

(*h*) *Punchard* v. *Tomkins*, W. N. (1882) 160; 31 W. R. 286.

(*i*) *Stephenson* v. *Yorke*, (1900) 1 Ch. 505.

(*k*) 47 & 48 Vict. c. 54, ss. 14, 25.

(*l*) 51 & 52 Vict. c. 51, s. 14.

(*m*) 53 & 54 Vict. c. 69, s. 19.

(*n*) *Re Cooper*, 20 Ch. D. 611, C. A. See *Reg.* v. *Ritson*, L. R. 1 C. C. R. 200.

(*o*) As to England, see *sup.* pp. 1275, 1276; as to Ireland, see *Bushell* v. *Bushell*, 1 Sch. & L. 103; *Lord Dunsany* v. *Latouche*, 1 Sch. & L. 137, 157; *Underwood* v. *Lord Courtown*, 2 Sch. & L. 64; and *Pentland* v. *Stokes*, 2 Ba. & Be. 68.

(*p*) As to Ireland, see *Underwood* v. *Lord Courtown*, *sup.*; *Biddulph* v. *St. John*, 2 Sch. & L. 521.

(*q*) *Morecock* v. *Dickens*, Amb. 678, *sup.*

(*r*) *Bedford* v. *Backhouse*, 2 Eq. Ca. Abr. 615.

able mortgagee getting in the legal estate without notice (*s*), may tack their respective securities, although the mesne incumbrance be duly registered.

It is the folly of a purchaser or mortgagee to advance his money without having previously ascertained whether the legal estate be outstanding or not; and if the legal estate is shown to be outstanding, it is his business to get it in, or give proper notice of his incumbrance. If he neglect so to do, he takes the consequences.—*Vigilantibus non dormientibus subveniunt leges.*

But a legal registered mortgagee cannot set up an unregistered charge against a subsequent registered mortgage; the unregistered charge is by the Act fraudulent and void against the latter (*t*).

In Ireland, however, by force of the peculiar wording of sect. 3 of 6 Anne, c. 2 (Ireland) (*u*), and not because registration amounts to notice under the Irish Act any more than it does under the English Acts (*x*), a prior registered deed, although only a charge (*y*), and even registered articles of agreement, will have preference over a subsequent deed, although it be a conveyance of the legal estate without notice (*z*). In fact, priority is according to the time of registration, and consequently tacking has no application (*a*).

It is, however, only a deed above exception and untainted with fraud which will acquire priority by registration (*b*).

By virtue of the Act of 1884 (*c*), the same considerations will apply to mortgages of land in Yorkshire, unless tainted by "actual fraud."

(*s*) *Cator* v. *Cooley*, 1 Cox, 182.

(*t*) *Credland* v. *Potter*, L. R. 10 Ch. 8.

(*u*) 1 Sch. & L. 98.

(*x*) *Bushell* v. *Bushell*, 2 Sch. & L. 90; *Underwood* v. *Lord Courtown*, 2 Sch. & L. 41; *Pentland* v. *Stokes*, 2 Ba. & Be. 75.

(*y*) *Bushell* v. *Bushell*, *sup.*; *Eyre* v. *Dolphin*, 2 Ba. & Be. 290—300; *Thompson* v. *Simpson*, 1 Dr. & War. 486; *McNeill* v. *Cahill*, 2 Bli. 228; *Mill* v. *Hill*, 3 H. L. C. 828.

(*z*) *Bushell* v. *Bushell*, *sup.*; *Warburton* v. *Loveland*, 6 Bli. N. S. 1; 2 Dow & Cl. 480; *Fullerton* v. *Provincial Bank*, (1903) A. C. 309.

(*a*) *Bushell* v. *Bushell*, *sup.*; *Lord Dunsany* v. *Latouche*, 1 Sch. & L. 137. See *Tenison* v. *Sweeny*, 1 J. & L. 710; *Carlisle* v. *Whaley*, L. R. 2 H. L. 391; Molesworth on Registration in Ireland, 32, 66.

(*b*) *Underwood* v. *Lord Courtown*, 2 Sch. & L. 64.

(*c*) 47 & 48 Vict. c. 54, s. 14, set out *sup.* p. 1274.

CHAPTER LVI.

PRIORITIES AS BETWEEN THEMSELVES OF SUCCESSIVE MORTGAGEES OF PERSONALTY.

SECTION I.

PRIORITY AS BETWEEN MORTGAGEES OF EQUITABLE INTERESTS IN PERSONALTY, OR OF DEBTS AND OTHER CHOSES IN ACTION.

Notice as determining priorities of successive incumbrances on trust funds, choses in action, &c.

1.—Of Priority by Notice generally.—As regards assignments by way of mortgage or otherwise of equitable interests, whether absolute, partial, or reversionary, in personalty, or of debts and other choses in action (*a*), the title of the assignee is complete without any notice; but as between successive assignees, their respective priorities will be regulated by the date at which notice was given to the person in whom the interest is vested in trust for the assignor, or who is liable in respect of the chose in action assigned.

Contemporaneous notices.

Where notices are contemporaneous, the securities in respect of which such notice is given will rank as between themselves according to priority of date according to the general rule applicable to assignments of equitable interests—*Qui prior est tempore potior est jure* (*b*).

Principle of the doctrine of notice stated in *Dearle* v. *Hall*.

The doctrine of notice as affecting priorities is of wide application, and embraces almost all dealings with outstanding rights in personal property; but it does not apply to land (*c*). The principle on which the doctrine is founded, as stated in the leading case of *Dearle* v. *Hall* (*d*), is that the general rule that, as between equities, priority in time must decide, must give way where the equities are not equal. "If there appears

(*a*) *Jones* v. *Gibbon*, 9 Ves. 410; *Cook* v. *Black*, 1 Ha. 390; *Ward* v. *Duncombe*, (1893) A. C. 369, 392.

(*b*) *Callisher* v. *Forbes*, L. R. 7 Ch. 109; *Johnstone* v. *Cox*, 19 Ch. D. 17, C. A.

(*c*) *Ante*, p. 1262.

(*d*) 3 Russ. 1, at pp. 21, 59.

to be, in respect of any circumstance independent of priority of time, a better title in the puisne purchaser to call for the legal estate, than in the purchaser who precedes him in date, the case ceases to be a balance of equal equities, and the preference which priority of date might otherwise have given, is done away with and counteracted."

It was said in *Ward* v. *Duncombe* (*e*) that "when *Dearle* v. *Hall* was decided it extended to all choses in action. Now it does not apply to choses in action at all, except to debts due or growing due to the bankrupt in the course of his trade or business."

Principle of the doctrine considered in *Ward* v. *Duncombe*

It has been stated that notice is necessary in order to perfect or complete the title of the assignee, and that the effect of notice is to convert the holder of the fund into a trustee for the person who gives the notice (*f*). But it was said in *Ward* v. *Duncombe* (*g*), that neither of these statements is strictly accurate; and it was pointed out in that case that an assignee of an equitable interest from a person capable of disposing of it has a perfect equitable title though subject to the infirmity which attaches to all equitable titles, which infirmity is not wholly cured or removed by notice; and, secondly, that the holder of the fund before notice given is just as much a trustee for the persons rightfully entitled as he is after he receives the notice, though of course, in the absence of notice, he would be safe in paying away the fund to those who appear to be the true owners.

It is quite clear that an equitable assignee who has not given notice will be bound by the equities between the assignor and the trustee, debtor, or other holder of the fund, so as to be obliged to allow any payments made by the holder of the fund subsequently to the assignment to the assignor or his assignees who have given notice (*h*).

But the doctrine does not apply where the assignor, though without notice, has so acted that the knowledge of his solicitor, who has notice of the transfer, must be imputed to him (*i*).

(*e*) (1893) A. C. 369, per Lord Macnaghten.

(*f*) See *Dearle* v. *Hall*, 3 Russ. 1, at pp. 12 *et seq.*

(*g*) (1893) A. C. 369, per Lord Macnaghten, at p. 392.

(*h*) *Norrish* v. *Marshall*, 5 Mad. 475; *Stocks* v. *Dobson*, 4 De G. M. & G. 11; *Cothay* v. *Sydenham*, 2 Bro. C. C. 391; *Leslie* v. *Baillie*, 2 Y. & C. C. C. 91; *Re Southampton's Estate*, 16 Ch. D. 178.

(*i*) *Dixon* v. *Winch*, (1900) 1 Ch. 736, C. A.

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Assignment abroad.

The fact that an assignment is made abroad in a country where notice is not necessary to complete the assignee's title does not exempt the assignee from the obligation to give notice (*k*).

Assignees of incumbrances.

Assignees of charges on equitable interests or choses in action have priority *inter se* according to priority of notice (*l*).

Application of the doctrine in bankruptcy.

The doctrine as to the regulation of priorities by notice applies not only as between several incumbrancers or purchasers for value, but also, to some extent, as between an incumbrancer or purchaser and the trustee in bankruptcy of the assignor.

Notice by trustee in mortgagor's bankruptcy.

A chose in action, or a reversionary or equitable interest of a bankrupt, passes to his trustee, but notice is in some cases required in order to perfect his title (*m*). In competition with *subsequent* incumbrancers, the trustee must give notice, otherwise he will be postponed to such incumbrancers without notice of the bankruptcy who first give notice, and it makes no difference that the trustee was not aware of the existence of the reversionary or other interest (*n*). If, however, the debtor or trustee obtains *aliunde* distinct notice of the bankruptcy, a particular assignee, who subsequently gives notice, will not thereby obtain priority over the bankruptcy trustee, though the latter may not have given formal notice of the bankruptcy (*o*).

Trustee in bankruptcy bound, though no notice given by assignee.

Where a chose in action or reversionary interest is assigned by a bankrupt before his bankruptcy without notice being given to the debtor or trustee of the interest, the trustee is bound, for the trustee cannot be in a better position than the bankrupt (*p*).

The rule is, that as between incumbrancers or assignees for value of a chose in action the incumbrancer or assignee who gives the first notice obtains priority. But a trustee in bankruptcy is not an assignee for value, and cannot therefore, by giving prior notice, obtain priority over an equitable mortgagee of a policy of insurance (*q*).

Receiver.

Where a receiver has been appointed after assignment for

(*k*) *Kelly* v. *Selwyn*, (1905) 2 Ch. 117.

(*l*) *Commissioners of Public Works* v. *Harby*, 23 Beav. 508.

(*m*) *Re Beall, inf.*

(*n*) *Palmer* v. *Locke*, 18 Ch. D. 381, C. A.; *Re Stone's Will*, W. N. (1893) 50. See *Re Beall, Exp. Off. Receiver*, (1899) 1 Q. B. 688.

(*o*) *Lloyd* v. *Banks*, L. R. 3 Ch. 488. See *Mercer* v. *Vans Colina*, 67 L. J. Q. B. 424.

(*p*) *Re Atkinson's Trusts*, 2 De G. M. & G. 142, at p. 143.

(*q*) *Re Wallis, Exp. Jenks*, (1902) 1 K. B. 719; cf. *Re Beall*, (1899) 1 Q. B. 688.

value of a debt, but before notice has been given to the debtor, the assignee has priority (*r*).

Notice does not affect title.

Notice given to a trustee does not affect any question as to the rights and liabilities, except as between successive incumbrancers. So, where in a suit it was decided that trustees had received notice of an incumbrance, but there were no *cestuis que trust in esse*, the Court would not declare that the interests of unborn issue were bound by the incumbrance, but merely declared that the trustee had notice of it (*s*).

Incumbrancer with notice of prior incumbrance.

A subsequent incumbrancer will not, by giving notice of the assignment to him, gain priority over a prior incumbrancer who has not given notice, if at the time of making his advance he had himself notice of the prior assignment (*t*).

Inquiry as to prior incumbrances.

An incumbrancer ought, before advancing his money, to inquire from the trustees, debtor, or other person liable to pay over the fund, whether they have notice of any prior incumbrances (*u*); but a subsequent incumbrancer will not be deprived of his priority, obtained by his notice, by reason of his omission to make inquiries as to the existence of prior incumbrances (*x*).

How far trustees, &c. are bound to answer inquiries.

The trustee or other person of whom such inquiry is made is under no obligation to answer the inquiry (*y*). If, however, he takes upon himself to do so, he is bound to give an honest answer to the best of his knowledge and belief, and will be responsible for any wilful misstatement made by himself or his agent (*z*). But he will not be responsible for a misrepresentation made honestly through forgetfulness or carelessness (*a*), and he is not bound to make inquiries himself (*b*). *A fortiori*, a trustee, upon accepting notice, is not bound to disclose any

(*r*) *Re Bristow*, (1906) 1 Ir. R. 215.

(*s*) *Wise* v. *Wise*, 2 J. & L. 403. See 13 L. R. Ir. 158.

(*t*) *Warburton* v. *Hill*, Kay, 470; *Spencer* v. *Clarke*, 9 Ch. D. 137; *Re Weniger*, (1910) 2 Ch. 291. See *Re Holmes*, 29 Ch. D. 786, C. A.; *Mutual Life Assurance Soc.* v. *Langley*, 32 Ch. D. 460, C. A.

(*u*) *Smith* v. *Smith*, 2 Cr. & M. 231.

(*x*) *Foster* v. *Blackstone*, 1 My. & K. 297; *Timson* v. *Ramsbottom*, 2 Keen, 49; *Etty* v. *Bridges*, 2 Y. & C. C. C. 486, 494; *Warburton* v. *Hill*, *sup.*; *Stocks* v. *Dobson*, 5 De G. & S. 760.

(*y*) *Low* v. *Bouverie*, (1891) 3 Ch. 82, C. A. See also *Ward* v. *Duncombe*, (1893) A. C. 369, at p. 383; *Taylor* v. *London and County Banking Co.*, (1901) 2 Ch. 231, C. A.

(*z*) *Brown* v. *Savage*, 4 Drew. 639. See *Lyde* v. *Barnard*, 1 M. & W. 101; *Swan* v. *Phillips*, 8 A. & E. 457.

(*a*) See *Derry* v. *Peek*, 14 App. Ca. 337, overruling *Burrowes* v. *Lock*, 10 Ves. 470; and *Slim* v. *Croucher*, 1 D. F. & J. 518.

(*b*) *Low* v. *Bouverie*, (1891) 3 Ch. 82, C. A.

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prior notice which he has received (*c*): and, if he is first assignee, he need not in the absence of inquiry inform a subsequent incumbrancer giving him notice (*d*).

Assignee of legal personal representative.

The right to priority which a second assignee of an equitable interest in a fund, who has given notice to the holder, possesses over a first assignee who has failed to give notice, applies equally where the second assignment is not by the assignor himself but by the legal personal representative of the assignor (*e*).

What notice is sufficient.

It is not necessary that the assignee, in order to ensure priority, should give express or formal notice to the trustee, debtor, or other person liable to pay the fund assigned; it is sufficient if such information or knowledge has been brought to the mind of that person as an ordinary man of business would act upon, and regulate his conduct in the matter accordingly (*f*); and it is not material in what character he acquired his knowledge, if in fact he had knowledge of a prior incumbrance at the time when he received formal notice of a second incumbrance (*g*). But incumbrances of which no notice is given do not apparently rank according to the order of the dates at which the trustees obtained accidental knowledge of them (*h*).

Parol notice.

In order to prevent any question as to priority by notice, the notice should be given in writing: but parol notice is sufficient if of a formal and precise character (*i*). General statements in casual conversation are not sufficient (*k*).

Parol notice must be clearly proved. Evidence of parol notice having been given to trustees in the course of conversation at a meeting on other business was not relied on as fixing the trustees with notice, in the face of their denial of having received notice (*l*).

(*c*) *Stephens* v. *Venables*, 31 Beav. 124.

(*d*) *Re Lewer*, 5 Ch. D. 61, C. A.

(*e*) *Re Freshfield's Trusts*, 11 Ch. D. 198; *Montefiore* v. *Guedalla*, (1903) 2 Ch. 27, C. A.

(*f*) *Lloyd* v. *Banks*, L. R. 3 Ch. 488. And see *Exp. Agra Bank, Re Worcester*, L. R. 3 Ch. 555; *Alletson* v *Chichester*, L. R. 10 C. P. 319.

(*g*) *Meux* v. *Bell*, 1 Ha. 73; *Tibbits* v. *George*, 5 A. & E. 107. And see *Gale* v. *Lewis*, 16 L. J. Q. B. 119.

(*h*) *Arden* v. *Arden*, 29 Ch. D. 702, 708.

(*i*) *Re Tichener*, 35 Beav. 317. See *Brown* v. *Savage*, 4 Drew. 635; *North British Insurance Co.* v. *Hallett*, 7 Jur. N. S. 1263.

(*k*) *Ford* v. *White*, 16 Beav. 123; *Edwards* v. *Martin*, L. R. 1 Eq. 121.

(*l*) *Saffron Walden Second Bene-*

The Court does not require a party to pay attention to vague rumours proceeding from strangers to the estate (*m*); notice, in order to be binding, must be given by some person who has an interest in the property (*n*).

Notice must be by person interested.

The notice should be made with some degree of precision as to the nature of the alleged right, and should not consist of a mere general and undefined claim (*o*). Where a notice of the assignment of a reversionary interest in a fund to secure a sum of money was silent as to a covenant contained in the same deed on the part of the assignor to charge the fund also with payment of premiums on a policy of assurance on his life effected by way of collateral security, the charge was postponed as to the premiums (*p*).

Notice should be precise as to nature of claim.

Notice, in order to affect the Bank of England, must be distinct notice of an existing claim upon the stock; since the bank stands, not in the position of a trustee, but of a depositary (*q*).

Notice to Bank of England.

Although it would not seem to be essential that the notice should exactly specify the amount claimed, or describe the fund charged with absolute correctness, provided it is sufficiently indicated what fund is intended to be affected, yet the Court will not allow the fund to stand charged in priority to other incumbrances for a sum in excess of that stated in the notice (*r*).

Notice need not state precisely the amount or the fund charged.

So if a notice is misleading as to the duration of a charge, the recipient will not be bound after the time when, according to the terms of the notice, it would apparently have expired (*s*).

Misleading notice.

A mistake in the notice as to the date of a mortgage has been held to be immaterial (*t*).

Mistake in notice.

Inasmuch as the one of several successive incumbrancers who first gives the required notice to the proper person will gain preference over the others, a mortgagee of an equitable interest, debt, or other chose in action should be careful to give notice in writing immediately on completion of his security.

Time of notice.

fit Building Soc. v. *Rayner*, 14 Ch. D. 406, C. A.

(*m*) *Wildgoose* v. *Wayland*, Goulds. 147.

(*n*) *Barnhart* v. *Greenshields*, 9 Moo. P. C. 36; *Natal Land, &c. Co.* v. *Good*, L. R. 2 P. C. 121, 129.

(*o*) *Jolland* v. *Stainbridge*, 3 Ves. 478.

(*p*) *Re Bright's Trusts*, 21 Beav. 430.

(*q*) *Humberstone* v. *Chase*, 2 Y. & C. Ex. 209.

(*r*) *Woodburn* v. *Grant*, 22 Beav. 483.

(*s*) *Stephenson* v. *Royce*, 5 Ir. Ch. R. 401.

(*t*) *Whittingstall* v. *King*, W. N. (1882) 83; 46 L. T. 520.

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The notice may, however, be given at any time so as to ensure priority over any incumbrancers who have not given notice, but subject to any assignments of which earlier notice has been given.

If an incumbrancer gives notice to a purchaser before actual payment of the purchase-money, it is sufficient (*x*), although the purchaser has given bond or other security (*x*); or after payment, but before execution of the conveyance (*y*); for it is all one transaction (*z*).

Notice to oust order and disposition clause in bankruptcy.

Where notice is required to take a case out of the order and disposition clause in bankruptcy, it is sufficient if it is given between the act of bankruptcy and the petition for adjudication, if the incumbrancer had no notice of the act of bankruptcy, the giving notice by the incumbrancer to the bankrupt being a *bonâ fide* dealing within the statute (*a*).

Notice sent through the post.

A written notice sent through the post will be deemed to have been given at the time when the letter would, in the ordinary course of delivery, have reached the last-known address of the person to whom it is sent (*b*); unless it can be shown that he was unavoidably prevented, by reason of absence or otherwise, from receiving the notice till afterwards (*c*).

To whom notice should be given.

It was formerly thought that the notice must in all cases be given to the person who has the legal control of the fund (*d*). But it is now settled that the proper person to whom the notice should be given is the person who, whether he actually has control of the fund, or is entitled to receive it from a third person in whose control it is, is liable to pay it over to the assignor, or, in other words, the person who is the immediate trustee of the assignor (*e*). And the recipient of the notice may thus be, according to the subject-matter, a trustee, executor, debtor, consignee, insurer, or trustee in bankruptcy.

Notice to trustee before the fund is in hand.

ii.—Notice to Trustees of Mortgaged Fund.—An assignee of the beneficial interest in a trust fund cannot gain priority

(*u*) *Tourville* v. *Naish*, 3 P. Wms. 307.

(*x*) *Ibid.*; and *Hardingham* v. *Nicholls*, 3 Atk. 304.

(*y*) *Wigg* v. *Wigg*, 1 Atk. 384; *Fitzgerald* v. *Burk*, 2 Atk. 397; *Moore* v. *Mayhow*, 1 Ch. Ca. 34; *Story* v. *Lord Windsor*, 2 Atk. 630.

(*z*) *Wigg* v. *Wigg*, *sup.*

(*a*) *Re Styan*, 1 Ph. 105; *Rutter* v. *Everett*, (1895) 2 Ch. 872; *Re Seaman*, (1896) 1 Q. B. 412.

(*b*) *Loader* v. *Hiscock*, 1 F. & F. 132.

(*c*) *Bird* v. *Bass*, 6 Man. & Gr. 143.

(*d*) *Bridge* v. *Beadon*, L. R. 3 Eq. 664, 667.

(*e*) *Stephens* v. *Green*, (1895) 2 Ch. 148, C. A. See *Holt* v. *Dewell*, 4 Ha. 446.

by giving notice of the assignment to a person who may possibly become, but is not at the time of the notice, actually a trustee of the fund (*f*). Assignments of which such premature notice is given will, as between themselves, rank in priority of date, but will be postponed to a subsequent assignment, notice of which is given after the trust has actually arisen (*g*). But the doctrine that a trustee or stakeholder is at liberty to disregard a notice given previously to the actual receipt of the fund must be applied with caution (*h*).

No trustee.

The rule as to notice applies though there is no trust fund and no trustee in existence at the date of the assignments; it is sufficient if notice is given after the fund has come into existence to a person who has legal control of it (*i*).

Notice to one of several trustees.

Where there are several executors or trustees, the ordinary and most prudent course is to give notice to each of them; but notice to one of them will generally be sufficient to take the property out of the order and disposition of the assignor if he should become bankrupt, and to prevail over a notice of another assignment subsequently given to all the trustees (*k*). But notice to one does not affect the other trustees who have no knowledge of the notice so as to make them liable for what they may do in ignorance of the notice (*l*).

Death of trustee who has notice.

An assignee who has given notice to all the existing trustees is not bound to renew the notice on any change of trustees. If, therefore, one of several trustees, who alone has received notice of an assignment, dies, his death will not deprive the assignee of the priority he has acquired as against assignments made before the death and of which all the trustees have notice (*m*). The same principle would apparently apply where one of several trustees has received notice of an assignment and dies, and a person taking an assignment after his death gives notice of it

(*f*) *Buller* v. *Plunkett*, 1 J. & H. 441; *Webster* v. *Webster*, 31 Beav. 393; *Somerset* v. *Cox*, 33 Beav. 634; *Addison* v. *Cox*, L. R. 8 Ch. 76; *Earl of Suffolk* v. *Cox*, 15 W. R. 732.

(*g*) *Calisher* v. *Forbes*, L. R. 7 Ch. 109; *Johnstone* v. *Cox*, 16 Ch. D. 571, affirmed, except as to costs, 19 Ch. D. 17, C. A.; *Re Dallas*, (1904) 2 Ch. 385.

(*h*) Dav. Conv. vol. ii. pt. 2, p. 226. See *Marsh* v. *Peacocke*, 9 Jur. N .S. 780.

(*i*) *Re Dallas*, (1904) 2 Ch. 385.

(*k*) *Ward* v. *Duncombe*, (1893) A. C. 369. See *Smith* v. *Smith*, 2 Cr. & M. 231; *Meux* v. *Bell*, 1 Ha. 73; *Browne* v. *Savage*, 4 Drew. 635; *Lloyds Bank* v. *Pearson*, (1901) 1 Ch. 865, *ante*, p. 1257.

(*l*) *Low* v. *Bouverie*, (1891) 3 Ch. 82, 104. See *Phipps* v. *Lovegrove*, L. R. 16 Eq. 80.

(*m*) *Re Phillips' Trusts*, (1903) 1 Ch. 183; *Ward* v. *Duncombe*, (1893) A. C. 369, overruling the previous decisions on this point, *Timson* v. *Ramsbottom*, 2 Keen, 35; and *Winchelsea* v. *Garrety*, 1 Beav. 223.

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to the surviving trustees, so as to prevent the later assignment from gaining priority over the earlier one (*n*). This seems to follow from a recent decision where it was held that where notice is given to all the existing trustees, and after their death a subsequent assignment is made of which notice is given to the new trustees, who had no notice of the first assignment, the right of the prior assignee prevails (*o*).

No notice required where trustee is mortgagee.

Where a trustee advances money to a beneficiary on the security of an equitable assignment of his interest in the trust fund his knowledge of the assignment will be sufficient without formal notice to the other trustees, and his security will prevail over all assignments of which formal notice is subsequently given to all the trustees (*p*). So if he has a set-off or equities against the fund, he has priority, and no notice can affect it (*q*).

Exception where trustee beneficiary assigns his interest to a stranger.

But the general rule that notice to one of several trustees is sufficient admits of an exception where one of the trustees is a beneficiary and assigns his interest in the trust fund to a stranger (*r*). Notice given by the assignee of a fund to a person who is himself the assignor is not effectual so as to alter priorities (*s*). The knowledge of one of several trustees, who is also a beneficiary, of a mortgage created by himself of his own share in the proceeds of land held in trust for sale is not by itself notice to the trustees; and such a mortgage will be postponed to a subsequent mortgage of which due notice has been given to the trustees (*t*). But if the mortgagee serve formal notice of the assignment on the trustee-mortgagor, such notice will be sufficient as against subsequent mortgagees who give notice to all the trustees. If, however, a trustee beneficiary assigns his interest to a co-trustee, there is no conflict between interest and duty as regards the latter, and his knowledge will constitute sufficient notice to the trustees to give him priority (*u*).

(*n*) See *Ward* v. *Duncombe*, *sup.* at p. 394.

(*o*) *Re Wasdale*, *Brittin* v. *Partridge*, (1899) 1 Ch. 163.

(*p*) *Elder* v. *Maclean*, 3 Jur. N. S. 284; *Thompson* v. *Tomkins*, 2 Dr. & S. 8; *Assignees of Dunne* v. *Hibernian Joint Stock Co.*, Ir. R. 2 Eq. 82; *Phipps* v. *Lovegrove*, L. R. 16 Eq. 80.

(*q*) *Somerset* v. *Cox*, 33 Beav. 634; *Nelson* v. *London Assurance Co.*, 2 S. & St. 292.

(*r*) *Brown* v. *Savage*, 4 Drew. 635; *Commrs. of Public Works* v. *Harby*, 23 Beav. 508; *Willes* v. *Greenhill*, 4 De G. F. & J. 147. But see *Exp. Rogers*, *Re Selby*, 8 De G. M. & G. 271, where there were special circumstances.

(*s*) *Re Dallas*, (1904) 2 Ch. 385.

(*t*) *Lloyds Bank* v. *Pearson*, (1901) 1 Ch. 865.

(*u*) *Brown* v. *Savage*, 4 Drew. 635.

Where a fund is subject only to one set of trusts, the assignee who first gives notice to the trustees, in whom the fund is legally vested, will gain priority over other assignees prior to him in point of time; in such a case, the assignee of the beneficial interest, by giving notice to the trustees, whose duty it is to distribute the estate among the persons beneficially entitled, places the trustees under a direct responsibility to himself; and, if they disregard the notice, they do so at their peril (*x*).

Notice where no derivative trust.

Where there are two settlements, one original and the other derivative, the notice should be given not to the trustees of the original settlement who hold and have control over the property, but to the immediate trustees of the *cestui que trust*, that is to say, to the persons whose duty it would be, but for the notice, to pay over the fund to him (*y*). But notice to the trustees of the original settlement, though ineffectual to give priority, may be a very valuable protection to the assignee (*z*).

Original and derivative trusts.

Where an absolute legacy is mortgaged, notice must be given to the executor of the will, and such notice will bind the money in the executor's hands, as against subsequent incumbrancers, if he has not assented to the legacy (*a*).

Absolute legacy.

If the mortgaged legacy is derived under two successive wills, then, at all events, until the executor of the second will has assented to the legacy, the executor of the first will is in no sense a trustee for the legatee under the second will; his duty is merely, in the course of administration of the estate of his testator, to hand the money over to the executor of the second will, and notice to the former will be of no avail; the latter is the person whose duty it is to hand over the money, so far as not required for the purpose of administering his testator's estate, to the legatee; the notice must, therefore, in such a case be given to the executor of the second will (*b*).

Derivative legacy.

Where a trustee is a creditor on the fund, and cannot complete his title by personal notice, he should take care that it appears on the declaration of trust or other equivalent instrument (*c*); but after an effectual notice from other persons, the

Where trustee is also creditor.

(*x*) *Ryall* v. *Rowles*, 1 Ves. Sen. 348; *Dearle* v. *Hall*, 3 Russ. 1. See *Ward* v. *Duncombe*, (1893) A. C. 369, at p. 392; *Stephens* v. *Green*, (1895) 2 Ch. 148, at p. 158, C. A.

(*y*) *Stephens* v. *Green*, (1895) 2 Ch. 148, at p. 163, C. A.

(*z*) *Stephens* v. *Green*, (1895) 2 Ch. 148, at p. 161.

(*a*) *Holt* v. *Dewell*, 4 Ha. 446.

(*b*) *Stephens* v. *Green*, (1895) 2 Ch. 148, C. A.

(*c*) *Commissioners of Public Works* v. *Harby*, 23 Beav. 508.

trustee cannot set up any new charge or set-off, and he is bound to withhold all further payments to the mortgagor (*d*).

Notice to solicitor of trustees.

Notice of the assignment of an equitable interest or chose in action given to the solicitor of the trustees, or other proper persons to receive notice, may be sufficient to give priority, though such notice is not communicated to the clients (*e*). But the solicitor served with the notice must be either expressly or by acting in the particular matter, impliedly authorized to receive such notices, and notice to a person who has no such authority but is merely the solicitor usually employed in the matters of a trust, is not sufficient to create a priority as against a subsequent incumbrancer who gives notice to the trustees personally (*f*).

Notice to agent.

Notice to any authorized agent, other than a solicitor, is sufficient (*g*).

Liability for disregarding notice.

The trustee or other proper person to receive notice is bound to accept it, and, if he disregard it, he will be liable to the assignee to make good the fund (*h*).

Payment to the assignor after notice by one of several persons entitled to charges will not affect the rights *inter se* of the persons entitled to the charges to what remains of the fund. The mortgagee or his assignee cannot after notice be affected by transactions between the holder of the fund and the mortgagor unknown to the mortgagee (*i*).

Notice of assignment of personalty to be given to trustees or executors.

As between assignees of an equitable interest in personalty or a legacy, whether the interest be present or future, vested or contingent, notice should be forthwith given to the trustees or executors, it being now decided that if a person takes an assignment of such an interest, and does not give notice of it to the trustees, a subsequent assignee giving such notice will gain preference (*k*).

(*d*) *Stephens* v. *Venables*, 31 Beav. 124.

(*e*) *Richards* v. *Gledstanes*, 31 L. J. Ch. 142; *Willes* v. *Greenhill*, 4 De G. F. & J. 147.

(*f*) *Brittain* v. *Brown*, 24 L. T. 504; *Brewin* v. *Briscoe*, 28 L. J. Q. B. 329; *Saffron Walden Second Benefit Building Soc.* v. *Rayner*, 14 Ch. D. 406, C. A.

(*g*) *Re Henessy*, 2 Dr. & War. 555.

(*h*) *Williams* v. *Thorp*, 2 Sim. 257; *Roberts* v. *Lloyd*, 2 Beav. 376; *Andrews* v. *Bousfield*, 10 Beav. 50; *Re Henessy*, 2 Dr. & War. 555.

(*i*) *Liquidation Estates Co.* v. *Willoughby*, (1898) A. C. 321.

(*k*) *Foster* v. *Cockerell*, 3 Cl. & F. 456; *Dearle* v. *Hall*, *Loveridge* v. *Cooper*, 3 Russ. 1; *Cumming* v. *Prescott*, 2 Y. & C. Ex. 488; *Cooper* v. *Fynmore*, 3 Russ. 60; *Jones* v. *Jones*, 8 Sim. 633; *Ward* v. *Duncombe*, (1893) A. C. 369.

This principle applies to land given upon trust for sale (*l*), and has been held to apply even where the first incumbrancer could not give notice because he never knew of the charge created in his favour (*m*), or because he did not know of the existence of any trustee or person to whom notice could be given (*n*).

When notice must be given of assignments of interests arising out of land.

Although, as between successive incumbrancers of equitable interests in land, notice to the trustees is not necessary, and is of no avail for the purpose of gaining priority (*o*), yet priority will be gained by notice, when the property assigned is an interest in land vested in trustees of such a nature that it can only reach the hands of the beneficiary in the shape of money (*p*).

Land devised on trust for sale.

Thus it has been held, where lands were devised to trustees on trust for sale, that an incumbrancer of the beneficial interest who gave notice to the trustees thereby gained priority over a prior incumbrancer who omitted to give such notice (*q*).

Proceeds of sale of land.

So, where freeholds were conveyed to trustees upon trust to sell and pay certain creditors, and subject thereto upon trust for A. for life, with remainder to B. in fee; B. then granted certain annuities charged upon the estates, and subsequently mortgaged the estates without notice of the annuities; A. having died, the trustees sold the estates and the mortgagee gave notice to them of his mortgage; it was held that the mortgagee had the first charge on the sale moneys in priority over the annuitants by reason of his notice to the trustees (*r*).

On the principle of the decision last referred to, it will be advisable that where a settled estate or any interest therein is mortgaged the mortgagee should ascertain if any part of the estate consists of capital moneys arising under the Settled Land Acts in the hands of the trustees of the settlement, and, if so, that he should give notice of his charge to the trustees.

Portion fund.

So, also, where by a marriage settlement a term was vested in trustees to raise portions for younger children, one of whom

(*l*) *Lloyds Bank* v. *Pearson*, (1901) 1 Ch. 865.

(*m*) *Re Lake, Exp. Cavendish*, (1903) 1 K. B. 151.

(*n*) *Re Dallas*, (1904) 2 Ch. 385.

(*o*) *Ante*, p. 1262.

(*p*) *Lee* v. *Howlett*, 2 K. & J. 531; *Thomas* v. *Cross*, 2 Dr. & S. 423.

(*q*) *Consolidated Investment Co.* v. *Riley*, 1 Giff. 371; 5 Jur. N. S. 1283.

(*r*) *Foster* v. *Blackstone*, 1 My. & K. 297, affirmed in D. P. *sub nom.* *Foster* v. *Cockerell*, 3 Cl. & F. 456; *Lloyds Bank* v. *Pearson*, (1901) 1 Ch. 865.

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mortgaged his share, but no notice of the charge was given to the trustees, the mortgagor having become bankrupt, it was held that the mortgagee had not an interest in land, and that therefore, having neglected to give notice, he was not entitled to priority as against the assignees in bankruptcy (*s*).

Whether assent of executor is material as regards notice.

Where the legacy is a fund vested in trustees, it has been held that notice to the trustees given before the executor has assented to the legacy will be insufficient to protect the assignment (*t*). And it would seem clear that at the present day, where a fund derived under a settlement or prior will is bequeathed by a subsequent will, it would be immaterial whether the legacy had been assented to or not, as the duties of the trustees, or of the executors of the former will, would be confined to carrying out their own trust or duty by paying over the money to the legal personal representative of their deceased *cestui que trust*, whose receipt would effectually discharge them from seeing to the application of the money in accordance with any ulterior dispositions made by their *cestui que trust;* it is conceived, therefore, that in such a case notice to the trustees, or to the executors of the first will, would be of no avail, but that notice to the executor, whether he has assented or not, would be sufficient to protect the mortgagee of the legacy (*u*).

Legacy given in trust.

If a testator creates a trust of a fund, the executor will *ab initio* have notice of the claim of the trustees, and, accordingly, if a beneficial interest in the fund is mortgaged, it will be the duty of the executor, after he has assented to the legacy, to pay the money over to the trustees, and no notice can prevent him from doing so, or affect the fund in the hands of the trustees; it is therefore obvious that the trustees are the proper persons to receive the notice.

Reputed ownership.

iii.—**Notice of Mortgage of Debts and other Choses in Action.**—The doctrine of reputed ownership has been already

(*s*) *Re Hughes' Trusts*, 2 H. & M. 89; *Re Baldwin*, (1903) 1 Ir. R. 338.

(*t*) *Holt* v. *Dewell*, 4 Ha. 446. See *Stephens* v. *Green*, (1895) 2 Ch. 148, C. A.

(*u*) Wigram, V.-C., in *Holt* v. *Dewell*, and Stirling, J., in *Stephens* v. *Green*, laid stress on the point that in those cases the legacies assigned had not been assented to; but the L.JJ. in the latter case seem to have based their decision on the broad principle that a trustee or executor of a prior settlement or will has nothing to do with interests arising under a subsidiary settlement or testamentary disposition made by their *cestui que trust*.

considered in its relation to bills of sale of goods (*x*). A few points on this subject may be shortly noticed here with regard to its bearing on debts.

The Bankruptcy Act, 1883 (*y*), virtually re-enacts the reputed ownership clause of the Act of 1869 with an alteration which appears to be material, the words in the later Act being "debts due *or growing due* in the course of his trade or business."

Instalments under a hire-purchase agreement are "debts growing due" within the section (*z*).

Notice of assignment of debt.

On the assignment of a debt, in order, not only in the case of a trade debt, to take the subject of assignment out of the order and disposition of the bankrupt, but also generally to ensure priority as against other assignees of a debt, it is necessary and sufficient that notice be given to the debtor or other person from whom the assignor is entitled to claim payment of the money (*a*), who may not always be the original debtor (*b*).

Partnership debt.

Where the debt assigned is owing from a partnership firm, notice of the assignment given to one of the partners is notice to the partnership (*c*). And where one firm makes an equitable assignment to another firm of a debt owing to the former to secure advances by the latter, and both firms have a common partner, the assignee firm will be affected with notice of all equities attaching to the assignment (*d*).

Debt of company in liquidation.

On the assignment of a debt owing by a company in course of being wound up, notice must be given to the official liquidator (*e*).

No distinction between legal and equitable incumbrances.

As regards the necessity of giving notice of an assignment of a debt or other chose in action, there is no distinction between legal and equitable incumbrances (*f*).

iv.—Notice of Mortgages of Policies of Life Assurances.—

As to necessity of giving notice of assignment of policy.

Where a policy of life assurance is assigned by way of mort-

(*x*) See *ante*, pp. 185 *et seq.*

(*y*) 46 & 47 Vict. c. 52, s. 44 (iii).

(*z*) *Exp. Rawlings, Re Davis*, 60 L. T. 156.

(*a*) *Ryall* v. *Rowles*, 1 Ves. Sen. 348; *Exp. Monro*, Buck, 300; *Exp. Smither*, 3 M. & A. 693; 1 Deac. 413; *Douglas* v. *Russell*, 4 Sim. 524; *Boyd* v. *Mangles*, 3 Exch. 387.

(*b*) *Gardner* v. *Lachlan*, 4 My. & Cr. 129; *Buck* v. *Lee*, 3 N. & M. 580; *Exp. M'Turk*, 2 Deac. 58.

(*c*) *Travis* v. *Milne*, 9 Ha. 141; *Re Worcester Corn Exchange Co.*, 3 De G. M. & G. 180.

(*d*) *Steele* v. *Stuart*, L. R. 2 Eq. 84.

(*e*) *Wragge's Case*, L. R. 5 Eq. 284.

(*f*) *Exp. Arkwright*, 3 M. D. & De G. 129; *Exp. Wood*, 3 M. D. & De G. 315.

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gage, the mortgagee must be careful, on completion, to give notice of the assignment to the office.

Life policies not within order and disposition of bankrupt.

Before the Bankruptcy Act, 1869, notice of such mortgage or assignment must have been given to the office, to take it out of the reach of the bankrupt laws (*g*); but now choses in action are excluded from the order and disposition clause (*h*); and a policy of assurance is a chose in action within the section (*i*). A trustee in bankruptcy therefore takes subject to all equities, and cannot obtain priority over a mortgagee of a policy by giving notice before the mortgagee (*k*).

The rule, however, as to notice still applies as between different incumbrancers on the policy, quite irrespective of the bankrupt law (*l*); and, in order to complete the title to a policy, notice must still be given to the office. The reason for the notice is that otherwise the office might safely pay the money to the person who had, without the knowledge of the office, ceased to be its creditor, and it would be impossible to make the office pay it over again (*m*); or the mortgagee might defeat the assignment by surrendering the policy or the bonuses to the office (*n*).

By the statute 30 & 31 Vict. c. 144, s. 3, it is enacted as follows:—

Notice of assignment to be given.

"No assignment made after the passing of this Act of a policy of life assurance shall confer on the assignee therein named, his executors, administrators, or assigns, any right to sue for the amount of such policy, or the moneys assured or secured thereby, until a written notice of the date and purport of such assignment shall have been given to the assurance company liable under such policy, at their principal place of business for the time being, or in case they have two or more principal places of business, then at some one of such principal places of business, either in England or Scotland or Ireland, and the date on which such notice shall be received shall regulate the priority of all claims under any assignment; and a payment *bonâ fide* made in respect of any policy by any assurance company before the date on which such notice shall have been received shall be as valid against the assignee giving such notice as if this Act had not been passed."

(*g*) *Ryall* v. *Rowles*, 1 Ves. Sen. 348; *Williams* v. *Thorp*, 2 Sim. 257; *Thompson* v. *Spiers*, 13 Sim. 469.

(*h*) B. A. 1869, s. 15, par. 5; B. A. 1883, s. 44 (iii).

(*i*) *Exp. Ibbetson, Re Moore*, 8 Ch. D. 519, C. A.; *Re Wallis, Exp. Jenks*, (1902) 1 K. B. 719; *ante*, p. 1282.

(*k*) *Re Wallis, Exp. Jenks, sup.*

(*l*) *Wilmott* v. *Pike*, 5 Ha. 19, 20.

(*m*) *Edwards* v. *Martin*, L. R. 1 Eq. 121.

(*n*) *Fortescue* v. *Barnett*, 3 My. & K. 36; *Stocks* v. *Dobson*, 4 De G. M. & G. 11.

Meaning of "assignment."

An agreement for a mortgage, though accompanied by a deposit of the policy, is not an assignment within the meaning of the Act (*o*). And accordingly, notice to the assurance company of such an agreement gave no priority over a prior equitable mortgagee who had given no notice but who had possession of the policy (*p*).

Notice after death.

The notice to the office may be given after the death of the assured, and priority may be gained thereby (*q*). But such notice will not, in the case of a mere deposit of a policy with a creditor, entitle him to demand payment without the concurrence of the debtor's legal personal representative (*r*).

Priority of incumbrancers *inter se* by giving notice.

But, as regards the rights *inter se* of several incumbrancers on a policy, it does not necessarily follow that the order in which the notices are given to the office will absolutely, and without regard to circumstances, determine the priority of the several claims to the policy moneys. The concluding words of sect. 3 are merely intended for the protection of insurance offices, and to give them facilities for settling claims by enabling them to recognise as the first claim, the claim of the person who first gave such notice as is required by the statute; the words were not intended to affect the rights of persons claiming interests in the moneys outside the insurance office. And, therefore, if a first incumbrancer on a policy fails to give the prescribed notice, and a second incumbrancer whose charge is made with notice of the first charge and subject to it, gives notice to the office, he will not thereby exclude the person who had the first incumbrance (*s*).

A mortgagee who advances money on a policy without obtaining the policy is put on inquiry and fixed with constructive notice of the security of a prior mortgagee who holds it, and he cannot obtain priority by giving notice to the insurance office (*t*).

But a subsequent mortgagee is not bound to give notice to a prior mortgagee, and the latter, though he holds the policy,

(*o*) *Crossley* v. *City of Glasgow Life Assurance Co.*, 4 Ch. D. 421; *Spencer* v. *Clarke*, 9 Ch. D. 137. See *Re Haycock's Policy*, 1 Ch. D. 611; and *Scottish Amicable Society* v. *Fuller*, Ir. R. 2 Eq. 53.

(*p*) *Spencer* v. *Clarke*, *sup.*

(*q*) *Re Russell's Policy Trust*, L. R. 15 Eq. 30.

(*r*) *Webster* v. *British Empire, &c.*, 15 Ch. D. 169, C. A.

(*s*) *Newman* v. *Newman*, 28 Ch. D. 674.

(*t*) *Re Weniger's Policy*, (1910) 2 Ch. 291; following *Spencer* v. *Clarke*, 9 Ch. D. 137.

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cannot obtain priority for further advances over incumbrancers who gave prior notice to the office, unless perhaps such further advances were part of the original bargain and were made without notice of other charges (*u*).

Proof of discharge of mortgage.

Where notice of a mortgage on a policy has been given to the office they are entitled to require proof of satisfaction of the mortgage, although no claim has been made by the mortgagee; as the latter might, by virtue of the Policies of Assurance Act, 1867 (*x*), have sued the office in his own name (*y*).

Notice to office and to grantee on sub-mortgage of policy.

If a policy of assurance is sub-mortgaged, notice should be given both to the office and to the grantee of the policy. Where a mortgagee of a policy of assurance created an equitable sub-mortgage by deposit, but no notice was given either to the office or to the original mortgagor, it was held on the bankruptcy of the original mortgagee under the old law that the sub-mortgage was invalid against his assignees (*z*). In such a case, notice of the sub-mortgage to the original mortgagor would probably have been sufficient without notice to the office (*a*). But if notice of the original mortgage had been given to the office, then notice of the sub-mortgage to the office would have been necessary and sufficient (*b*).

Mutual assurance company.

In the case of mutual assurance companies, wherein every insurer becomes a partner, his dealing with his own policy will not be considered as a partnership act affecting the society with notice (*c*).

As to share in partnership.

A share in a partnership has been held to be a chose in action within the meaning of the Bankruptcy Act so as to be excluded from the operation of the "order and disposition clause" (*d*).

Notice of assignment of shares in companies not required as against

v.—Notice of Mortgages of Shares in Companies.—Shares in a joint-stock company are excepted from the operation of the order and disposition clause of the Bankruptcy Act, 1883 (*e*), it having been decided that such shares are choses in

(*u*) *Re Weniger's Policy*, (1910) 2 Ch. 291; following *Spencer* v. *Clarke*, 9 Ch. D. 137.

(*x*) 30 & 31 Vict. c. 144.

(*y*) *Re Haycock's Policy*, 1 Ch. D. 611.

(*z*) *Exp. Wood*, 3 M. D. & De G. 315.

(*a*) *Holt* v. *Dewell*, 4 Ha. 446.

(*b*) *Exp. Barnett*, 1 De G. 194; *Thompson* v. *Tomkins*, 2 Dr. & S. 8.

(*c*) *Re Bromley*, 13 Sim. 475; *Martin* v. *Sedgwick*, 9 Beav. 333; *Exp. Arkwright*, 3 M. D. & De G. 129.

(*d*) *Re Bainbridge, Exp. Fletcher*, 8 Ch. D. 218.

(*e*) 46 & 47 Vict. c. 52, s. 44 (iii). See further, as to order and disposition in bankruptcy, *ante*, pp. 185 *et seq.*

action within this exception, whether the bankrupt's interest in the shares is legal (*f*) or equitable (*g*).

trustee in bankruptcy.

No notice of assignment of such shares is therefore necessary to protect the assignee as against the assignor's trustee in bankruptcy.

As to mortgages by deposit of shares.

Where mortgages of shares are effected by deposit of the certificates, it is now settled that (at all events where such shares are transferable only by deed) notice to the company of the deposit is not necessary to take the mortgaged shares out of the order and disposition of the mortgagor (*h*).

Whether the decision last referred to would equally apply where, by the regulations of the company, transfers of shares may be effected otherwise than by deed is perhaps open to question; but it is conceived that it would.

Doctrine of notice not applicable to assignment of shares as company not bound to regard trusts.

Moreover, notice to the company is not required, and will not avail to ensure priority as between successive assignees of equitable interests in shares in companies registered under the Companies Act (*i*), or to companies governed by regulations similar in effect to the provisions of sect. 27 of that Act, which enacts that "no notice of any trust, express, implied or constructive, shall be entered on the register, or be receivable by the registrar."

So also, as regards railway companies and other public companies, they are generally protected against taking notice of trusts affecting their shares, by the provisions of sect. 20 of the Companies Clauses Act, 1845 (*k*).

Companies incorporated by Royal Charter or Special Act, and not coming within the above general enactment, are usually protected by the terms of their instruments of incorporation; and such protection is absolute as regards notices of assignments of shares (*l*).

Mortgages of shares in company rank in priority of date.

It was laid down by Jessel, M.R., that a company cannot look behind the register as to beneficial interests, but must take the register as conclusive, and cannot inquire for any purpose whether the interest of the registered holder is affected by any trust or mortgage (*m*). This rule was questioned in a later case

(*f*) *Colonial Bank* v. *Whinney*, 11 App. Ca. 426.
(*g*) *Exp. Barry, Re Fox*, L. R. 17 Eq. 113.
(*h*) *Colonial Bank* v. *Whinney*, 11 App. Ca. 426.
(*i*) 8 Edw. VII. c. 69, s. 27.
(*k*) 8 & 9 Vict. c. 16.
(*l*) See *Simpson* v. *Molson's Bank*, (1895) A. C. 270.
(*m*) *Pulbrook* v. *Richmond Mining Co.*, 9 Ch. D. 610.

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by the Court of Appeal (*n*). But the principle of the rule has been affirmed by the House of Lords, who accordingly decided that the rule laid down in *Dearle* v. *Hall* (*o*), as to the effect of notice in determining the priority of equitable rights does not apply to shares in a company, and that, where such shares are equitably mortgaged in succession to several incumbrancers the priority of the mortgagees will be determined by the dates of the mortgages, not by the dates at which notices of the mortgages were given to the company (*p*).

Advisability of notice to exclude claims of company.

The principle of *Hopkinson* v. *Rolt* (*q*) is not precluded by the Companies Act, 1908, s. 27; and therefore an equitable mortgagee of shares should also give notice of his incumbrance to the company, as such notice, though it will not give him precedence over other incumbrancers who are prior in point of time, will affect the company itself so as to prevent the company from claiming priority in respect of any lien for debts accruing due from the shareholder after the company has received notice of the mortgage (*r*).

It seems that a company *may* take notice of equities, and *ought* to recognise notice of an assignment to the extent of not registering a transfer until they have allowed time for a restraining order to be obtained (*s*).

What notice should be given.

In order that notice to a company may be effectual, either it must be given to the company itself through its proper officers, or it must be received by the company in the course of its business; casual knowledge acquired by the secretary as an individual, and not while he is engaged in transacting the business of the company, is not notice to the company (*t*). So where one of the parties to an assignment of shares in a company is the secretary of that company, notice will not be imputed to the company (*u*).

(*n*) *Bainbridge* v. *Smith*, 41 Ch. D. 462, C. A. See *Re Bainbridge, Reeves* v. *Bainbridge*, W. N. (1889) 228.

(*o*) 3 Russ. 1.

(*p*) *Société Générale de Paris* v. *Walker*, 11 App. Ca. 20. See also *Re Bahia, &c. Rail. Co.*, L. R. 3 Q. B. 584; *Barton* v. *London & North Western Rail. Co.*, 24 Q. B. D. 77.

(*q*) 9 H. L. C. 514.

(*r*) *Bradford Banking Co.* v. *Briggs, Son & Co.*, 12 App. Ca. 29. See further as to lien of a company on shares, *post*, p. 1422.

(*s*) *Simpson* v. *Molson's Bank*, (1895) A. C. 270, 279; *Peat* v. *Clayton*, (1906) 1 Ch. 659.

(*t*) *Société Générale de Paris* v. *Tramways Union Co.*, 14 Q. B. D. 424, affirmed in D. P., *sub nom. Société Générale de Paris* v. *Walker*, 11 App. Ca. 20.

(*u*) *Exp. Boulton*, 1 De G. & J. 163.

Notice to directors, &c.

It is sufficient if directors in a company receive the information in the course of the transactions of the company, as by verbal information at a board (*x*). Otherwise notice to individual directors is not notice to the board (*y*); nor is notice to an auditor (*z*); nor to an actuary (*a*). But notice to the secretary, official liquidator, or other officer who represents the company will bind it (*b*). And the assignee will not be affected by the neglect of the recipient of the notice to make a proper entry (*c*). Casual notice, however, brought home to the secretary, not as secretary, but as an individual, is not notice to the company (*d*).

Notice to member.

Notice to an individual member of a company is not notice to the company (*e*).

Notice to trustees where shares are settled.

Of course if shares in a company are registered in the names of trustees as the legal holders thereof, notice of a mortgage of a beneficial interest in such shares must be given to the trustees.

Assignees of an equitable interest in stock or shares should also either require an indorsement of their security on the settlement, or place on the fund the notice now substituted for distringas, or obtain a transfer of the fund into Court and obtain a stop order thereon (*f*).

Rule as to notice of charge.

vi.—Notice of Mortgages of Freight and Cargo.—The principle that a first mortgagee of a chose in action by omitting to give notice to the person holding the fund at the order and disposition of the assignor enables the assignor to deal with the property as his own, and thereby obtain fictitious credit, applies to mortgages of freight and cargo.

Notice of mortgage of freight.

With regard to mortgages of freight, notice under ordinary circumstances should be given to the charterers or their agent, being the persons liable to pay the freight to the owner of the ship (*g*). But where a ship-agent on behalf of the owner of a

(*x*) *Exp. Agra Bank, Re Worcester,* L. R. 3 Ch. 555.

(*y*) *Exp. Burbridge,* 1 Deac. 142; *Re Hampshire Land Co.,* (1896) 2 Ch. 743.

(*z*) *Re Henessy,* 2 Dr. & War. 555.

(*a*) *Exp. Watkins,* 2 M. & A. 348.

(*b*) *Re Henessy, sup.; Breech-Loading Armoury Co.,* L. R. 5 Eq. 284; *Alletson* v. *Chichester,* L. R. 10 C. P. 319.

(*c*) *North British Ins. Co.* v. *Hallett,* 7 Jur. N. S. 1263.

(*d*) 14 Q. B. D. at p. 438.

(*e*) *Re Carew's Estate,* 31 Beav. 39.

(*f*) *Phipps* v. *Lovegrove,* L. R. 16 Eq. 80.

(*g*) *Re Pride of Wales,* 15 W. R. 381.

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ship entered into a charter-party, whereby the charterer agreed to pay to the agent a sum for freight, and the owner afterwards assigned the freight as security for an advance, it was held that notice given to the ship-agent only was sufficient to take the freight out of the order and disposition of the shipowner on his bankruptcy, inasmuch as the agent, and not the charterer, was the person liable to pay the money to the shipowner (*h*).

Notice of mortgage of cargo.

In the case of a mortgage of cargo at sea, the notice should be given to the master (*i*) or the consignee (*k*). The notice should be given as soon as circumstances will admit, and priority will be lost by neglect to send notice where there were means of communicating with the ship (*l*).

Transhipment of cargo.

A mortgagee of a ship and cargo does not lose his priority by the subsequent transhipment of the cargo into a different ship and its consignment to different parties, although a subsequent incumbrancer gives notice before him to such consignee, if the mortgagee, upon hearing of the shipment and consignment, is guilty of no delay in giving notice to the new consignees (*m*).

Priority according to date of charge.

Where incumbrancers are alike innocent and are equally diligent in completing their title, priority in the date of their respective securities will, as in equitable mortgages of realty, give the advantage (*n*).

vii.—Application of Doctrine of Tacking to Personalty.—The doctrine of tacking applies not only to real estate, but also to personal property; but its application to personalty, other than leaseholds, is of rare occurrence in practice, inasmuch as, as has been already seen, priority of assignments is generally regulated, in the case of equitable interests in personalty, debts, and other choses in action, by priority of notice, and in the cases of bills of sale of chattels, and of mortgages of ships, by priority of registration.

As regards choses in action, however, so far as the rule as to priority by notice does not apply, successive assignments or charges will rank according to priority of date; and, accordingly, a first incumbrancer, though his title is merely equitable,

(*h*) *Gardner* v. *Lachlan*, 4 My. & Cr. 129.
(*i*) *Langton* v. *Horton*, 1 Ha. 549.
(*k*) *Feltham* v. *Clark*, 1 De G. & S. 307; *Exp. Kelsall*, De G. 113.
(*l*) *Exp. Lucas*, 3 De G. & J. 113.
(*m*) *Feltham* v. *Clark*, 1 De G. & S. 307.
(*n*) *Cato* v. *Irving*, 5 De G. & S. 210.

may, in such a case, tack further advances against mesne incumbrances, of which he had no notice at the time when he made such advances. So, where an officer gave to the plaintiff a charge on the proceeds of sale of his commission, and then gave further charges on the same fund to other persons, and subsequently, the plaintiff, without notice of the mesne charges, made to the officer a further advance secured on the same fund; immediately upon the proceeds of sale of the commission being lodged with certain army agents for distribution, the several incumbrancers, including the plaintiff, gave to the agents contemporaneous notices of their respective charges; it was held that the plaintiff was entitled to tack his further advance to his original security in priority to the mesne charges (*o*).

But a mortgagee of a policy cannot obtain priority for further advances made on a new bargain and secured by a new charge over incumbrancers who give prior notice to the insurance office; though if the original bargain were for further advances, such further advances made without notice would, it seems, take priority (*p*).

A registered mortgagee of a ship cannot tack an unregistered further charge against a subsequent registered mortgage given to other persons where the unregistered charge was not exclusively for the first mortgagee's benefit (*q*). But generally the mortgagee is entitled to tack a further charge in priority to every equitable charge of which he had not notice (*r*).

Section II.

Priority obtained in certain Cases by Legal Proceedings.

Former writ of distringas.

i.—Notice in Lieu of Distringas.—Formerly, a person claiming to be interested as incumbrancer or otherwise in any stock or shares not in Court, might have protected himself against transfer of the stock or shares or payment of dividends

(*o*) *Calisher* v. *Forbes*, L. R. 7 Ch. 109.

(*p*) *Re Weniger's Policy*, (1910) 2 Ch. 291.

(*q*) *Parr* v. *Applebee*, 7 De G. M. & G. 585.

(*r*) *Liverpool Marine, &c. Co.* v. *Wilson*, L. R. 7 Ch. 507.

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thereon to any other person without notice to him by means of a writ of distringas, which might have been issued under the statute 5 Vict. c. 5 against any public company, whether incorporated or not, in whose books any such stock or shares might be standing.

Filing, &c of notices as to stock.

By Ord. XLVI. r. 2, no writ of distringas is now to be issued under the statute 5 Vict. c. 5; and by rule 4, any person claiming to be interested in any stock standing in the name of a company (*s*) may, on an affidavit by himself or his solicitor in the prescribed form, and on filing the same at the Central Office with a notice in the prescribed form, and on procuring an office copy of the affidavit and a duplicate of the filed notice authenticated by the seal of the Central Office, serve the office copy and the duplicate notice on the company (*t*). By rule 8, such service is to have the same force and effect against the company as a writ of distringas would formerly have had. Rule 9 provides for the withdrawal or discharge of the notice; and rule 11 further provides for the amendment of the description of the stock referred to in the notice. By rule 10—

Effect of request for transfer of stock on payment of dividend.

"If, whilst a notice filed under rule 4 of this order continues in force, the company on whom it is served receive from the person in whose name the stock specified in the notice is standing, or from some person acting on his behalf or representing him, a request to permit the stock to be transferred or to pay the dividends thereon, the company shall not, by force or in consequence of the service of the notice, be authorized, without the order of the Court or a judge, to refuse to permit the transfer to be made or to withhold the payment of the dividends for more than eight days after the date of the request."

Effect of notice in lieu of distringas.

The operation of the notice in lieu of distringas is therefore merely temporary; it does not of itself give priority to the person giving the notice, but merely prevents the fund from being dealt with without notice to him, so as to give him an opportunity to establish his claim. The notice should, therefore, be immediately followed up by an application either for a restraining order under the stat. 5 Vict. c. 5, s. 5, or an injunc-

(*s*) By R. S. C. Ord. XLVI. r. 3, the expression "company" includes the Governor and Company of the Bank of England, and any other public company, whether incorporated or not, and the expression "stock" includes shares, securities, and dividends thereon.

(*t*) P. M. R. 24.

tion against dealing with the stock, and the order obtained should be served on the legal owners of the stock (*u*).

Notice in lieu of distringas thus does not dispense with the necessity of giving notice of an assignment of the beneficial interest in stock or shares to the legal owners, but is merely ancillary to such notice, and affords some protection against the fund being improperly dealt with notwithstanding such notice.

Failure to give notice.

Failure to give notice under sect. 4 does not affect priorities, for where notice of an assignment has been given to a company it will prevent the company from registering a transfer to a subsequent purchaser, which is precisely the same result as follows from notice under the rule (*x*).

Where the assignor of an undivided share in a fund is also trustee of the fund, the notice in lieu of distringas should be placed upon the whole fund (*y*).

Mortgagee not party to action may obtain stop order.

ii.—Stop Orders on Funds in Court.—Where the subject-matter of a mortgage is a fund in Court standing to the credit of an action, notice to the Paymaster of a charge upon the fund was formerly of no avail to give priority over other incumbrances (*z*). In such a case, the proper course was for a mortgagee to obtain a stop order, which he might do, though he was not a party to the cause or proceeding in which the fund in Court was standing. But now, under the Supreme Court Funds Rules (*a*), notice to the Paymaster is sufficient, and a stop order on the fund is no longer necessary (*b*).

With regard to applications for stop orders, the Rules of the Supreme Court, Ord. XLVI., provide as follows:—

Service of application for stop order.

Rule 13. "Any person presenting a petition or taking out a summons for any such order as aforesaid shall not be required to serve such petition or summons upon the parties to the cause or matter, or upon the persons interested in such parts of the moneys or securities as are not sought to be affected by any such order."

(*u*) *Re Blaksley's Trusts*, 23 Ch. D. 549. See *Re Marquis of Hertford*, 1 Ph. 129; *Société Générale de Paris* v. *Tramways Union Co.*, 14 Q. B. D. 424, at p. 453; *Hobbs* v. *Wayet*, 36 Ch. D. 256, at pp. 259, 260.

(*x*) *Peat* v. *Clayton*, (1906) 1 Ch. 659.

(*y*) *Wilkins* v. *Sibley*, 4 Giff. 442.

(*z*) *Warburton* v. *Hill*, Kay, 470; *Haly* v. *Barry*, L. R. 3 Ch. 452.

(*a*) S. C. F. R. 1905, r. 99.

(*b*) 21 Q. B. D. 488, 496, 498, 500.

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Previous charging order no longer necessary.

It is no longer necessary that a judgment creditor should obtain a charging order in the Division of the High Court in which his judgment was recovered as a preliminary to obtaining a stop order on a fund standing in Court to the credit of the Chancery Division (*c*).

Fund must be in Court.

No stop order can be obtained over a fund unless either it is actually in Court, or unless an order for payment in has been made, although the fund has not actually been paid in (*d*).

Orders in lunacy.

Orders of the nature of stop orders on funds paid into Court in lunacy will not be granted on the application of the assignee of the expectant interest of the next of kin of the lunatic (*e*).

The Court may grant a stop order on securities brought into Court (*f*); but the application of a mortgagee of a reversion for a stop order on deeds in Court was refused (*g*).

Mode of applying for stop order.

Applications for stop orders are made by summons (*h*). But if a fund exceeding 1,000*l*. has been paid into Court under the Trustee Act, and there has been no previous application in the matter of the fund, a petition is necessary (*i*).

Service of petition or summons.

The assignor, though he is a party to the cause, must be served with the petition or summons (*k*); but other parties need not generally be served, and, if served unnecessarily, the applicant may be ordered to pay their costs (*l*). It has been held, however, that all persons already having effectual stop orders on the fund ought to be served (*m*); but persons having stop orders on contingent interests in a fund which, in the events which have happened, have never vested, need not apparently be served (*n*).

Evidence in support of application.

In support of the application, the title generally of the assignor must be proved, either by the proceedings in the cause, or by affidavit; and the assignment must be shown, either by proving its execution or by the assignor appearing and admitting it (*o*). There must be either proof or admission of

(*c*) *Shaw* v. *Hudson*, 48 L. J. Ch. 689; *Hopewell* v. *Barnes*, 1 Ch. D. 630.

(*d*) *Shaw* v. *Hudson*, *sup.*; *Wellesley* v. *Mornington*, 11 W. R. 17.

(*e*) *Re Wilkinson*, L. R. 10 Ch. 73.

(*f*) *Williams* v. *Symonds*, 9 Beav. 523.

(*g*) *Cotton* v. *Cotton*, 6 Beav. 96.

(*h*) *Walsh* v. *Wason*, 22 W. R. 676.

(*i*) *Re Toogood*, 56 L. T. 703. For form of summons, see Dan. Ch. F. 1670.

(*k*) *Parsons* v. *Groome*, 4 Beav. 521.

(*l*) *Glazebrook* v. *Gilliat*, 9 Beav. 611.

(*m*) *Hulkes* v. *Day*, 10 Sim. 41.

(*n*) *Vernon* v. *Croft*, 36 W. R. 778.

(*o*) *Wood* v. *Vincent*, 4 Beav. 419; *Quarman* v. *Williams*, 5 Beav. 133.

the assignment; the order will not be made without prejudice to any question as to the validity of the incumbrance (*p*). But an order on a fund paid into Court under the Trustee Relief Act was made without prejudice to a lien for costs claimed by a trustee (*q*).

Rights of parties not affected.

A stop order, except so far as it affects the priorities of assignments, does not affect or decide any rights or questions of title (*r*); all that is done is to prevent payment of the fund out of Court without notice to the person who has obtained the order, so that he may then appear and support his rights. A stop order may therefore be made on a fund the title to which is in dispute (*s*).

So where at the hearing of a cause an order had been made for payment out of Court of a fund to the plaintiff, and a person, not a party to the cause, having a claim against the plaintiff, applied for a stop order, it was ordered that the fund be retained in Court, on the terms that the claimant should, within ten days, file a bill to establish his claim (*t*).

How far a stop order gives priority to an incumbrancer.

Inasmuch, however, as, on payment into Court, the control and custody of the fund vests in the Court, the issuing of a stop order is tantamount to notice to the persons who would have had the legal control of the fund, if it had not been in Court, and who, but for such stop order, would be entitled to have the money paid out of Court to them. If, therefore, those persons would be the proper persons to receive notice, if the fund were in their hands, then a stop order will be the effectual way of gaining priority and preventing any subsequent incumbrancer from getting priority over the person who obtained the stop order (*u*).

The principle that priority is given to the person obtaining a stop order over prior incumbrances of which he has no notice applies equally where the second assignment is not by the assignor himself, but by the legal personal representative of the assignor (*x*).

(*p*) *Winchilsea* v. *Garrety*, 1 Beav. 223.
(*q*) *Re Blunt*, 10 W. R. 379.
(*r*) *Hawkesley* v. *Gowan*, 12 W. R. 1100; *Lucas* v. *Peacock*, 9 Beav. 177.
(*s*) *Hawkesley* v. *Gowan*, *sup.*
(*t*) *Feistel* v. *King's College, Cambridge*, 11 Beav. 254.
(*u*) *Swayne* v. *Swayne*, 11 Beav. 483; *Thomas* v. *Cross*, 2 Dr. & S. 423; *Warburton* v. *Hill*, Kay, 470; *Re Holmes*, 29 Ch. D. 786, C. A.; *Mutual Life Assurance Soc.* v. *Langley*, 32 Ch. D. 460, at pp. 469, 471, 473, C. A.; *Mack* v. *Postle*, (1894) 2 Ch. 449, at p. 456.
(*x*) *Montefiore* v. *Guedalla*, (1903) 2 Ch. 26.

But where notice to the persons who would have the legal control over the fund, if it were not in Court, would not be sufficient, neither will a stop order be sufficient (*y*), though a stop order in such a case may have a useful effect (*z*).

Where equitable incumbrancers have once obtained priority by notice before the fund is paid into Court, stop orders obtained by other incumbrancers cannot prejudice them (*a*). So an order obtained by a judgment creditor appointing a receiver will have priority over subsequent charging orders or stop orders, if at the date when the receiver was appointed the property of the debtor, owing to there being no fund in Court, could not be taken in execution by legal process (*b*).

Effect of notice to trustees of fund before payment into Court.

Until the Court has in some way taken possession of the whole fund, notice should be given to the trustee or executor, because his concurrence is necessary for the disposition of the residue in his hands (*c*).

Where the fund is in Court, a stop order must be obtained; a prior notice to the trustee will be insufficient (*d*).

Where the fund is partly in Court and partly in the hands of the trustee, a stop order gives priority over the fund in Court, and notice to the trustees priority over the funds in their hands (*e*).

It was held in one case (*f*) that notice to an executor of a charge on the interest of the residuary legatee in a fund, which had been paid into Court, was sufficient without a stop order as against the legatee's assignee in bankruptcy; but this decision was apparently grounded on the consideration that inasmuch as the executor had voluntarily paid the money into Court under the Trustee Act, he was not divested of all control over the money, as he would have been if he had paid it in under an order of the Court.

Stop order should specify particular interests affected.

A stop order on a particular share or interest in a fund in Court should expressly state that it affects only that share or interest; and the operation of the order, whether general or

(*y*) *Stephens* v. *Green*, (1895) 2 Ch. 148.

(*z*) *Ibid.* at p. 161.

(*a*) *Livesay* v. *Harding*, 23 Beav. 141; *Day* v. *Day*, 1 De G. & J. 144; *Brearcliff* v. *Dorrington*, 4 Dr. & S. 122; *Thomas* v. *Cross*, 2 Dr. & S. 423.

(*b*) *Re Anglesey, Galve* v. *Gardner*, (1903) 2 Ch. 727.

(*c*) *Warburton* v. *Hill*, Kay, 470. See *Matthews* v. *Gabb*, 15 Sim. 51.

(*d*) *Pinnock* v. *Bailey*, 23 Ch. D. 497.

(*e*) *Mutual Life Assurance Soc.* v. *Langley*, 32 Ch. D. 460, C. A.

(*f*) *Thompson* v. *Tomkins*, 2 Dr. & S. 8. See 32 Ch. D. at p. 470.

particular, is confined to the amount on which the order is founded (*g*).

It should be stated expressly on the face of a stop order whether capital or income is to be affected thereby (*h*), and if the order does not expressly limit its operation to capital or income only, it ought apparently to be treated, at the Paymaster-General's Office, as extending to both capital and income (*i*).

Costs.

The costs occasioned by a stop order may be ordered to be paid by the person obtaining it (*k*).

An assignee of a fund in Court is not entitled, as a general rule and under all circumstances, to the costs of getting a stop order (*l*). But a mortgagee is entitled to such costs where the mortgage deed expressly empowers him to apply to the Court for a stop order (*m*).

Effect of stop order

A person who obtains a stop order against a fund will, in the event of its being paid out to the wrong person, be entitled to have the fund made good out of the Consolidated Fund (*n*).

against trustee in bankruptcy.

An assignee who has obtained a stop order after the bankruptcy of the assignor has priority over the trustee in bankruptcy who has not obtained an order (*o*). So, also, if the trustee of a composition deed neglects to obtain a stop order, he will be postponed to an assignee who has obtained one (*p*).

Where the mortgagee of an equity of redemption in a reversionary interest obtained a stop order, and then took a further charge, but did not obtain another stop order, the assignees of the mortgagor bankrupt were held to be bound by the further charge (*q*).

Trustees should obtain a stop order.

It is a breach of trust for trustees who have advanced money on the security of a fund in Court if they omit to obtain a stop order (*r*).

(*g*) *Macleod* v. *Buchanan*, 4 De G. J. & S. 265.

(*h*) Mr. Justice Stirling issued directions to this effect as regards applications for stop orders made to him. See S. C. F. R. 1905, r. 99.

(*i*) *Mack* v. *Postle*, (1894) 2 Ch. 449.

(*k*) Ord. XLVI. r. 12.

(*l*) *Grimsby* v. *Webster*, 8 W. R. 725.

(*m*) *Waddilove* v. *Taylor*, 6 Ha. 307.

(*n*) *Bath* v. *Bath*, (1901) 1 Ch. 460.

(*o*) *Stuart* v. *Cockerell*, L. R. 8 Eq. 607; *Palmer* v. *Locke*, 18 Ch. D. 381, C. A. See *Mercer* v. *Vans Colina*, 67 L. J. Q. B. 424.

(*p*) *Birmingham, &c. Co.* v. *Carter*, 20 W. R. 354.

(*q*) *Grainge* v. *Warner*, 6 W. R. 219.

(*r*) *Wheatley* v. *Bastow*, 7 De G. M. & G. 261.

Where trustees, &c. have a lien on the fund.

Where an agent or trustee has a lien upon a fund in his hands, which he pays into Court, he should obtain a stop order, otherwise his lien may be postponed to other incumbrancers obtaining stop orders (*s*). So where the trustee himself becomes an incumbrancer on the fund in Court, he will not be safe without a stop order (*t*). But the lien of a solicitor on a fund in Court, recovered or preserved through his instrumentality, prevails over the security of an assignee of the fund who has obtained a stop order (*u*).

To what account the fund must be carried.

If after a stop order by an incumbrancer on part of a fund, the fund is distributed, and the share of the mortgagor is carried over "to the account of the mortgagor and his incumbrancers," another incumbrancer who afterwards obtains a stop order on the share gains no priority; but upon the distribution of the fund, care should be taken that the share is not carried over to the account of the mortgagor alone (*x*).

Where, in an administration suit, a fund in Court had been carried over to a separate account, and the person beneficially entitled thereto charged her interest, and the incumbrancer obtained a stop order thereon, it was subsequently discovered that the assignor was liable jointly with the testator for breach of trust, which was made good out of the testator's estate; it was held, that though the assignor was liable to contribute, the incumbrancer was entitled to priority over the claim for contribution (*y*).

Notice of prior incumbrance.

An incumbrancer of a fund in Court who, at the time of taking his security, had notice of a prior incumbrance, cannot, by obtaining a stop order, gain priority over the first incumbrancer, although the latter never obtains a stop order (*z*). But the fact that a subsequent incumbrancer has, at the time when he obtains a stop order, notice of the prior incumbrance will not deprive him of priority if he had no such notice at the time when he took his security (*a*).

(*s*) *Swayne* v. *Swayne*, 11 Beav. 463.

(*t*) *Elder* v. *Maclean*, 3 Jur. N. S. 283.

(*u*) *Haymes* v. *Cooper*, 33 Beav. 431; *Faithfull* v. *Ewen*, 7 Ch. D. 495.

(*x*) *Lister* v. *Tidd*, L. R. 4 Eq. 462.

(*y*) *Re Eyton, Bartlett* v. *Charles*, 45 Ch. D. 458, approved *Edgar* v. *Plomley*, (1900) A. C. 431. See *Re Jervoise*, 12 Beav. 209.

(*z*) *Re Holmes*, 29 Ch. D. 786, C. A.

(*a*) *Mutual Life Assurance Soc.* v. *Langley*, 32 Ch. D. 460, C. A.

An equitable execution by appointment of a receiver does not require a stop order in order to ensure priority over subsequent charging orders and stop orders, if at the date when the receiver was appointed the property of the judgment debtor could not be taken in execution or made available by any other legal process (*b*).

Whether a stop order is necessary to give priority to an equitable execution.

Section III.

Priority by Registration.

i.—Priorities of Bills of Sale of Chattels.—As to priorities *inter se* as to bills of sale of goods, sect. 10 of the Bills of Sale Act, 1878 (*c*), enacts as follows:—

Priority of title.

"In case two or more bills of sale are given comprising in whole or in part the same chattels, they shall have priority in the order of their registration respectively as regards such chattels."

The effect of this enactment is, that every bill of sale must be registered immediately, without waiting for the expiration of the seven days; for a bill of sale, though registered within that period, and therefore valid under sect. 8 of the Act of 1878, would be postponed to a bill of sale of subsequent date, but registered before it (*d*).

Bill of sale must be registered immediately to ensure priority.

There is no rule that the holder of a bill of sale must perfect his title by taking possession of the chattels comprised therein. So, the holder of a prior registered bill of sale will not lose his priority by reason that the holder of a subsequent bill comprising the same chattels has taken possession of them, though without notice of the first bill of sale (*e*). And, conversely, the fact that the grantee under an earlier but unregistered bill of sale has taken possession of the goods will not give such

Possession gives no priority.

(*b*) *Re Anglesey, Galve* v. *Gardner*, (1903) 2 Ch. 727. See now Land Charges Act, 1900.

(*c*) 41 & 42 Vict. c. 31. See further, as to the Bills of Sale Act as affecting bills of sale given by way of security, *ante*, pp. 197 *et seq.*

(*d*) *Conelly* v. *Steer*, 7 Q. B. D. 520, C. A.

(*e*) *Exp. Allen, Re Middleton*, L. R. 11 Eq. 209; *Payne* v. *Cales*, 38 L. T. 355.

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grantee any priority over the holder of a subsequent bill of sale which has been duly registered (*f*).

General application of the rule.

The rule that the date of registration determines priority as between two bills of sale applies equally where both bills are absolute and where both are given as security for payment of money.

When prior bill is absolute and unregistered.

But as regards bills of sale executed since 1882, where a conflict arises between two bills of which the earlier in point of date is absolute but unregistered, and the later in date is given by way of security but is registered, the rule that priority is determined by the date of registration is qualified by the application of the rule laid down in sect. 5 of the Act of 1882 as to true ownership (*g*). In such a case, the unregistered absolute bill of sale, not being within the Act of 1882, passes the whole of the grantor's property in the goods to the grantee, except as against the trustee in bankruptcy and execution creditors of the grantor, so that the grantor is not the true owner of the goods within sect. 5 of that Act at the time when the second bill of sale is given. The second bill of sale is, therefore, void except as against the grantor, and cannot gain priority by registration (*h*).

When both bills are by way of security.

When the conflict is between two bills of sale, both given by way of security for money, the grantor does not part with the whole of his interest in the goods by the first bill, but retains the equity of redemption therein, so as to be still the "true owner" of the goods within the meaning of sect. 5 at the time when he gives the subsequent bill; and accordingly the rule will apply that the priority as between the two bills is determined by the date of registration (*i*).

Sale by grantor in possession of mortgaged goods in course of business.

As between the grantee of a bill of sale by way of security and a subsequent purchaser for value from the grantor without notice of the bill of sale, the rule is, that if the mortgaged goods comprise stock-in-trade of the grantor, who is allowed to continue his trade or business, then, inasmuch as the grantor retaining possession of the goods is thus enabled to hold himself forth as having not only the possession but the property in the goods, a purchaser in good faith will acquire a good title as

(*f*) *Lyons* v. *Tucker*, 7 Q. B. D. 523, C. A.

(*g*) See *ante*, p. 220.

(*h*) *Tuck* v. *Southern Counties Deposit*, 42 Ch. D. 471, C. A.

(*i*) *Thomas* v. *Searles*, (1891) 2 Q. B. 408, C. A.

against the grantee, provided the sale was made in the ordinary course of business (*k*), but not otherwise (*l*).

After-acquired chattels.

It has been seen that an assignment or charge by bill of sale given since 1st November, 1882, by way of security of any after-acquired chattels is absolutely void (*m*). Even as regards bills of sale executed before that date, only an equitable title to after-acquired property expressed to be assigned or charged passes thereby, and accordingly a subsequent mortgagee of such property who can get in the legal title without notice of the prior bill of sale will take in priority to the holder of that bill (*n*).

ii.—Priorities of Mortgages of Ships.—As regards the priority *inter se* of successive mortgages of ships, sect. 33 of the Merchant Shipping Act, 1894 (*o*), re-enacting the repealed sect. 69 of the Merchant Shipping Act, 1854 (*p*), enacts as follows:—

> "If there are more mortgages than one registered in respect of the same ship or share, the mortgagees shall, notwithstanding any express, implied, or constructive notice, be entitled in priority, one over the other, according to the date at which each mortgage is recorded in the register book, and not according to the date of each mortgage itself."

The section does not apply where priorities depend upon a state of facts wholly independent of the dates of the instruments (*q*).

The first registered legal mortgage of a ship confers on its holder a legal title; all other mortgages, whether prior in date but unregistered, or subsequent in registration, are mere equitable charges. An agreement to give a legal mortgage of a ship, as of other property (*r*), means that the mortgagor will

(*k*) *Lee* v. *Clutton*, 46 L. J. Ch. 48; *National Mercantile Bank* v. *Hampson*, 5 Q. B. D. 177; *Walker* v. *Clay*, 49 L. J. C. P. 560.

(*l*) *Cochrane* v. *Rymill*, 40 L. T. 744; *Consolidated Co.* v. *Curtis*, (1892) 1 Q. B. 495. See *Kidd* v. *Rawlinson*, 2 B. & P. 59; *Jezeph* v. *Ingram*, 1 Moo. 189; *Taylor* v. *McKeand*, 5 C. P. D. 358. As to continuance in possession of goods by a vendor after sale, see the Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 25.

(*m*) See *ante*, p. 220.

(*n*) *Joseph* v. *Lyons*, 15 Q. B. D. 280; *Hallas* v. *Robinson*, 15 Q. B. D. 288.

(*o*) 57 & 58 Vict. c. 60.

(*p*) 17 & 18 Vict. c. 104.

(*q*) *Benwell Tower*, 72 L. T. 664.

(*r*) *Thompson* v. *Clerk*, 1 M. L. C. 256.

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give a first mortgage, which, in the case of a ship, may, when perfected by registration, give to the mortgagee a paramount legal title (*r*).

The claim of a mortgagee, whether in possession or not, ranks below the claims of persons having maritime liens (*s*).

A first registered mortgagee cannot claim priority over a subsequent registered mortgagee for further advances (*t*).

Effect of omission to register.

The effect of the omission to register a mortgage of a ship is to postpone the mortgagee's claim to that of a subsequent mortgagee or transferee whose mortgage or transfer is registered before it (*u*), even though such mortgagee or transferee takes with notice of the prior charge (*x*).

An unregistered mortgage of a ship passes to the mortgagee, upon taking possession, the ownership of the ship as against a subsequent equitable assignment of the freight to a third person —at all events, in the absence of fraud or negligence equivalent to fraud (*u*). Where, however, the registration of a mortgage was concealed in order to obtain a better sale, the purchaser was not bound by it (*y*), but the validity of an agreement as to the disposal of money arising from the sale of a ship or the produce of the freight is not affected (*z*).

Where a mortgage stands registered in the name of a trustee for the mortgagee, and the latter takes another mortgage from the mortgagor, including the first mortgage money, an unregistered transferee of the second mortgage has priority over a subsequent unregistered agreement for a mortgage with the trustee, though the latter made his advances without notice (*a*). A registered mortgage of a ship has priority over an execution upon a judgment against the mortgagor, although the mortgage was not indorsed upon the certificate of the ship's register (*b*).

(*s*) *Orienta*, (1895) P. 49; *Ripon City*, (1897) P. at p. 243.
(*t*) *Benwell Tower*, 8 Asp. 13.
(*u*) *Keith* v. *Burrows*, 1 C. P. D. 722; reversed on another point, 2 App. Ca. 636.
(*x*) *Black* v. *Williams*, (1895) 1 Ch. 408. See *Barclay* v. *Poole*, (1907) 2 Ch. 284.
(*y*) *Hooper* v. *Gumm*, L. R. 2 Ch. 282.
(*z*) *Armstrong* v. *Armstrong*, 21 Beav. 78.
(*a*) *Stapleton* v. *Haymen*, 2 H. & C. 918; *Bell* v. *Blyth*, L. R. 4 Ch. 136.
(*b*) *Dickinson* v. *Kitchen*, 8 E. & B. 789.

CHAPTER LVII.

PRIORITY OF SECURITIES OF COMPANIES.

Railway companies.

i.—Securities of Railway and other Public Companies.—As regards railway companies, the Railway Companies Act, 1867 (*a*), enacted that the mortgages, bonds and debenture stock of a company should, with certain exceptions, have priority over the other debts and engagements of the company.

Debentures declared to be first charge on gross receipts.

So, where by an agreement entered into between a railway company and its debenture holders, confirmed and made binding by the special Act of the company, it was declared that the debentures should be a first charge on the gross receipts, it was held that the charge of the debenture holders had absolute priority, so as to preclude the company from applying any part of the gross receipts in payment of its working expenses to the detriment of the debenture holders (*b*).

Surplus lands.

The above enactment does not give to holders of mortgages, bonds, or debenture stock any lien or charge which they did not possess before the Act, so as to entitle them to payment in priority out of the proceeds of surplus lands of the company which have been sold (*c*).

Where a railway company took over the lines of an insolvent company and paid a sum for the rolling stock, it was held that the sum so paid was money coming to the receiver within sect. 4, and was liable under sect. 23 to be applied in satisfaction of the debentures of the insolvent company in priority to the unsecured creditors (*d*).

Debentures of companies incorporated by special Acts rank *pari passu*.

Debentures of companies incorporated by special Acts are, by the Companies Clauses Consolidation Act, 1845 (*e*), declared to be *pari passu* charges; and by the Companies Clauses

(*a*) 30 & 31 Vict. c. 127, s. 23.
(*b*) *Profit* v. *Wye Valley Rail. Co.*, 64 L. T. 669, C. A.
(*c*) *Re Hull, Barnsley and West Riding Junction Rail. Co.*, 40 Ch. D. 119, C. A.
(*d*) *Re Liskeard and Caradon Rly.*, (1903) 2 Ch. 681.
(*e*) 8 & 9 Vict. c. 16, s. 42, *ante*, p. 474.

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Act, 1863 (*f*), the holders of debenture stock are not, as between the members, to be entitled to any preference or priority.

This general enactment was not affected by a provision in a special Act which incorporated the general Act, that moneys were to be borrowed by order of a general meeting, so as to postpone securities given for moneys borrowed without such order: but, notwithstanding such provision, it was held that all the securities must be brought into hotchpot and consolidated, and the proceeds of the subject-matter must be distributed *pari passu* (*g*).

Debentures, etc. issued under different special Acts.

The enactments apply only to debentures or debenture stock issued under the same special Act, and do not operate so as to make holders of debentures issued under one Act rank *pari passu* with, instead of in priority to, holders of debentures issued under a later Act (*h*).

By the Companies Clauses Act, 1863 (*f*), s. 30, it is provided that the priority of mortgages and bonds granted before the "creation" of debenture stock shall not be affected.

Successive issues of debentures.

ii.—Securities of Joint-Stock Companies.—With regard to companies formed under the Companies Acts, successive series of debentures charged on the same property will rank in priority according to the date of issue (*i*); and where several debentures are issued on the same day they will, generally, rank in priority according to the order in which the company's seal was affixed to them successively; but if the debentures contain a provision that they shall be *pari passu* charges they will rank accordingly (*l*).

Mortgage Debenture Acts.

Debentures issued under the Mortgage Debenture Acts rank as *pari passu* charges (*m*).

Additional security.

Where it is provided, by statute or otherwise, that debentures shall rank *pari passu*, an additional security taken by one debenture holder is valid (*n*).

Issue of debentures.

Where the borrowing powers of a company are restricted to a

(*f*) 26 & 27 Vict. c. 118, s. 24.

(*g*) *Lankester's Pat. Co. v. Ashford*, 16 Ch. D. 411, 439.

(*h*) *Re Mersey Ref. Co.* (No. 1), [1886] 1 Ch. 368, C. A.

(*i*) 26 & 27 Vict. c. 118. *See Re Burry Port and Valley Rail. Co.*, 54 L. J. Ch. 710.

(*l*) *James v. Eaglesham Coal Co.*, W. N. (1886), p. 25, 2 Meg. 55.

(*l*) *Garside v. Silkstone and Dodworth Coal Co.*, 21 Ch. D. 762. *See also Howard v. Patent Ivory Co.*, 38 Ch. D. 156.

(*m*) *Ante*, p. 509.

(*n*) *De Winton v. Mayor of Brecon*, 26 Beav. 533.

certain amount, any debentures issued by the company, when its liabilities exceed that amount, are absolutely void, and will not entitle the holders thereof to any priority over any other creditors (*o*).

beyond prescribed limit.

Where a series of debentures are issued to secure an amount which is not wholly, but only in part, in excess of the prescribed limit, the debentures bearing the earlier numbers up to the amount limited will be declared valid, and the remainder of the debentures so issued will be void as in excess of the power (*p*).

Limit is only partially exceeded.

The Court has jurisdiction in a debenture holder's action to authorize money to be raised as a first charge on the assets in priority to the debenture holders where to do so is essential to the preservation of the company (*q*). But unless all parties interested are before the Court, strict proof of pressing emergency will be required (*r*). And where a company was in pressing want of money to meet current expenses in order to avert immediate ruin, it was held that a majority of the debenture holders could not bind a dissentient minority so as to sanction the raising a loan in priority to the debentures of the amount required (*s*).

Jurisdiction to order money to be raised by first charge on assets.

Where a receiver and manager in a debenture holder's action is authorised to borrow up to a certain amount, and he exceeds that limit, he will not be entitled to be indemnified unless he can show that he was justified in incurring further expense and liability without the leave of the Court (*t*). Where in such a case the receiver has borrowed part of the amount and repaid it, his original borrowing power is not diminished (*u*).

Receiver.

Debentures issued by a company may reserve the right of modifying the rights of the holders. So where a company issued debentures creating a first charge on its undertaking and property, each of which was held upon the condition that a

Power to modify priorities.

(*o*) *Re Pooley Hall Coll. Co.*, 18 W. R. 201. See also *English Channel Steamship Co.* v. *Rolt*, 17 Ch. D. 715, 719; *Howard* v. *Patent Ivory Co.*, 38 Ch. D. 156.

(*p*) *Howard* v. *Patent Ivory Co.*, *sup.* See *Re Bansha Woollen Mills Co.*, 21 L. R. Ir. 181.

(*q*) *Greenwood* v. *Algeciras Rail.*, (1894) 2 Ch. 205, C. A.; *Strap* v. *Bull, Sons & Co.*, (1895) 2 Ch. 1, C. A.; *Re Boynton*, (1910) 1 Ch. 519. See *Lathom* v. *Greenwich Ferry Co.*, 72 L. T. 790.

(*r*) *Securities, &c. Investment Corp.* v. *Brighton Alhambra*, 62 L. J. Ch. 516.

(*s*) *Hay* v. *Swedish, &c. Norwegian Rail. Co.*, W. N. (1889) 95, C. A.

(*t*) *Re British Power, &c. Co.*, (1906) 1 Ch. 497.

(*u*) *Milward* v. *Avill* (1897), 4 Mans. 403.

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general meeting of the debenture holders, by extraordinary resolution passed by a certain majority, might sanction any modification of the rights of the debenture holders against the company or its property: it was held that a resolution duly passed, sanctioning a loan to the company, to be a first charge on the company's property, was binding on dissentient debenture holders, and postponed their security to a mortgage given by the company to secure the loan (*x*).

Where a company issued debenture stock by way of floating security on its assets, purporting to be a first charge thereon, and subsequently issued debentures also by way of floating security, and purporting to be a first charge on the assets, it was held that the holders of the debenture stock had priority over the debenture holders, whether the latter had notice of the issue of this stock or not (*y*).

Purchase by company.

The effect of a company purchasing its own debentures is to extinguish the debt; for the company cannot be both mortgagor and mortgagee of its own property (*z*). Therefore where a company purchased some of the debentures of a series and assigned them to fresh holders for value, the holders were not entitled to rank *pari passu* with the other debenture holders (*a*).

Re-issue of debentures.

But by the Companies Act, 1908 (*b*), a company may, except where it is otherwise provided, reissue redeemed debentures, and the persons to whom they are reissued shall have the same rights and priorities as if they had not previously been issued. The section preserves the priority of the debentures as of the original date of issue and not merely as of the date of reissue (*c*).

Second issue of debentures before all first issued are taken up.

Where a company commenced to issue a first series of debentures, and, before all the debentures of that series were issued, raised further money by the issue of a second series of debentures, similar in form to those of the first issue, but expressed to be subject to the debentures already issued, "or such of them as were then outstanding": it was held that all the debentures of the second series were postponed to all the

(*x*) *Follit* v. *Eddystone Granite Quarries*, (1893) 3 Ch. 75. See *ante*, p. 489.

(*y*) *Smith* v. *English and Scottish Mercantile Investment Co.*, W. N. (1896) 86.

(*z*) *Re Routledge & Sons*, (1904) 2 Ch. 474.

(*a*) *Ibid.*; *Re Tasker & Sons*, (1905) 2 Ch. 587; *Re Russian Petroleum Co.*, (1907) 2 Ch. 540.

(*b*) 8 Edw. VII. c. 69, s. 104.

(*c*) *Fitzgerald* v. *Persse*, (1908) 1 Ir. R. 279.

first debentures, except some of them which had been paid off and reissued (*d*). So where a creditor who had an option to take debentures of a certain series did not exercise his option until ten years after the issue of the series, he was held entitled to rank as a debenture holder of the series (*e*).

Priority of specific mortgage over floating security.

Where a company issues debentures by way of floating security, and afterwards mortgages a specific part of its property in the ordinary course of business, or to secure an advance to enable it to carry on its business, the specific mortgagee will, as regards the property comprised in his mortgage, have priority over the debenture holders (*f*), even though by the express terms of the debenture itself the property is prohibited from being charged in priority to the debentures (*g*).

Preferential debts.

By sect. 209 of the Companies Act, 1908 (*h*), the debts made preferential by the Act are given priority over debenture holders with a floating charge; and every order appointing a receiver in a debenture holder's action directs him to forthwith pay such preferential debts out of any assets coming to his hands (*i*).

Fraudulent preference.

Sect. 210 of the Companies Act, 1908 (*k*), renders invalid mortgages given by a company, which, if given by a trader, would be void in bankruptcy for fraudulent preference; and, of course, any such securities cannot claim any priority over the creditors of the company, secured or unsecured.

No holder of a security, whether given by a company or by an individual, can claim priority in respect of such security if the transaction is tainted by fraud on the part of the holder (*l*).

Debentures of "one man" company

The question has been raised in several recent cases as to the validity of debentures of a private company formed by a trader, for the purpose of taking over his business, which are issued to the founder of the company as part of the consideration for the purchase of his business, or to his creditors in satisfaction of debts incurred by him in his business prior to the formation

(*d*) *Lister* v. *Henry Lister & Son*, 62 L. J. Ch. 568.

(*e*) *Pegge* v. *Neath Tramways*, (1898) 1 Ch. 183.

(*f*) *Fountaine* v. *Carmarthen Rail. Co.*, L. R. 5 Eq. 316; *Irvine* v. *Union Bk. of Australia*, 2 App. Ca. 366. See further as to debentures given by way of floating security, *ante*, pp. 502 *et seq.*

(*g*) *Re Castell and Brown*, (1898) 1 Ch. 315; *Re Valletort Sanitary Laundry Co.*, (1903) 2 Ch. 654; *Wilson* v. *Kelland*, (1910) 2 Ch. 306.

(*h*) 8 Edw. VII. c. 69.

(*i*) See W. N. (1900) p. 58.

(*k*) 8 Edw. VII. c. 69.

(*l*) See *post*, pp. 1319 *et seq.*

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of the company; but it may be regarded as settled that such securities are valid and will not lose any priority, to which they would otherwise be entitled, unless there is anything fraudulent or against the policy of the Companies Acts in the formation of the company (*m*), or some actual fraud in the transaction itself. So where a company was formed by a sole trader to take over his business, and was bound by agreement to indemnify him against certain debts and liabilities, it was held that debentures given by the company to a *bonâ fide* creditor of the trader in satisfaction of a debt specified in the agreement was for good consideration and valid (*n*); and so also where a trader caused a limited company to be registered for the purpose of carrying on his business, taking all the shares himself except six, and also debentures to secure payment of the amount for which he purported to sell the business of the company, it was held that the debentures were valid in priority over the unsecured creditors of the company (*o*).

Inquiry as to priority of debentures.

If, on the winding-up of a company, the assets are not sufficient to pay the debenture holders in full, and there is nothing to show an intention, either that they shall take effect *pari passu*, or in any order of priority, the Court will inquire as to the priority in date of debentures, or, if they are executed on the same day, then as to the order in which they were executed, and will distribute the assets in accordance with the priority thus ascertained (*p*).

(*m*) See as to this, *Salomon* v. *Salomon & Co.*, (1897) A. C. 22; *Re Hirth*, (1899) 1 Q. B. 612, C. A.

(*n*) *Seligman* v. *Prince & Co.*, (1895) 2 Ch. 617, C. A.

(*o*) *Salomon* v. *Salomon*, (1897) A. C. 22.

(*p*) *Gartside* v. *Silkstone, &c. Coal Co.*, 21 Ch. D. 762. See *James* v. *Boythorpe Coal Co.*, 2 Meg. 55; W. N. (1890) 28.

CHAPTER LVIII.

HOW THE PRIORITY OF A MORTGAGEE MAY BE LOST.

SECTION I.

LOSS OF PRIORITY BY FRAUD OR LACHES.

Positive fraud.

i.—Of Fraud as affecting a Mortgagee's Priority.— A mortgagee may lose his priority by fraud (*a*), as where a legal mortgage was ante-dated that it might not appear to be made on the eve of bankruptcy, and falsely recited that it related to a present advance (*b*). If a man, by the suppression of the truth which he was bound to communicate, or by the wilful suggestion of a falsehood, be the cause of prejudice to another who had a right to a full and correct representation of the fact, it is only equitable that his claim should be postponed to that of the person whose confidence was induced by his representation (*c*).

False denial of incumbrance by prior mortgagee.

If A., being about to lend money to B., informs C. of his intention, and asks C. whether he has any incumbrance on B.'s estate, and C. denies that he has any, whereby A. is induced to lend his money to B., and it proves that C. had at the time an existing mortgage or judgment on B.'s estate, this is fraud on the part of C., and his security shall be postponed to that of A. But to fix C. with the fraud, it is necessary that he should be informed of A.'s intention to lend the money; for otherwise the fraudulent intention is wanting on which the relief is to proceed, and the mere falsehood is not sufficient for such purpose (*d*).

Misstatement as to prior incumbrance.

So where a mortgagee, who was also a judgment creditor for a further sum, joined in a conveyance of the mortgaged pro-

(*a*) *Carter* v. *Carter*, 3 K. & J. 617.
(*b*) *Birch* v. *Ellames*, 2 Anst. 427.
(*c*) See *Pickard* v. *Sears*, 6 A. & E. 469; *Hooper* v. *Gumm*, L. R. 2 Ch. 282.
(*d*) *Ibbotson* v. *Rhodes*, 2 Vern. 554.

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perty which contained a false recital that the judgment debt had been discharged, it was held that he could not set up the judgment debt against a subsequent mortgagee (*e*).

Fraudulent concealment of prior incumbrance.

Even in the absence of actual misstatement, if a prior incumbrancer, or the holder of any prior right or equity, conceals his claim from a subsequent incumbrancer or purchaser for value, such concealment may amount to fraud so as to postpone the prior security or claim, if the prior incumbrancer or claimant is a party to the subsequent transaction or has knowledge of the nature of the transaction, and by his conduct leads the subsequent incumbrancer or purchaser to pay his money on the faith of the property being free from any such incumbrance or claim (*f*).

Misrepresentation or concealment by solicitor or agent.

Misrepresentation or fraudulent concealment of incumbrances by a solicitor or other agent of a prior mortgagee will bind the principal so as to postpone the security (*g*).

Solicitor acting for both parties.

Where a solicitor acts for both parties, and he has a general authority from one client, that client is postponed by the fraud of the solicitor (*h*).

Principal liable for fraud of agent.

A person who by his indiscretion (*i*) or neglect of duty (*k*) puts it in the power of another to deceive and raise money must take the consequences (*l*). Where the mortgagee was induced by the fraud of his solicitor to execute a deed by which the solicitor was enabled to give a security to a third party, the mortgagee was postponed (*m*). But where a mutual agent, authorised to borrow under a deed of mortgage in blank, filled in the blank to secure a debt owing by himself with a recital of payment which the mortgagee must have known to be untrue, the mortgagor was not estopped from denying the deed (*n*). So a mortgage of shares in a ship by the legal owner is a nullity as against the beneficial owner (*o*). Where

(*e*) *Cannock* v. *Jauncey*, 1 Drew, 497.

(*f*) *Berrisford* v. *Milward*, 2 Atk. 49; *Commiss. of Public Works* v. *Harby*, 23 Beav. 508; *Upton* v. *Vanner*, 1 Dr. & S. 594; *Strong* v. *Hawkes*, 4 De G. M. & G. 186; *Dixon* v. *Winch*, (1900) 1 Ch. 736, C. A.

(*g*) *Brown* v. *Thorpe*, 11 L. J. Ch. 78.

(*h*) *Boyd* v. *Craster*, 12 W. R. 787.

(*i*) *Farquharson* v. *King*, (1902) A. C. 325.

(*k*) *Rimmer* v. *Webster*, (1902) 2 Ch. 163.

(*l*) *Peter* v. *Russell*, 2 Vern. 726; *Briggs* v. *Jones*, L. R. 10 Eq. 92.

(*m*) *Hunter* v. *Walters*, L. R. 7 Ch. 75, 79; *King* v. *Smith*, (1900) 2 Ch. 425. See *Smith* v. *Evans*, 28 Beav. 59; *Gordon* v. *James*, 30 Ch. D. 249, C. A.

(*n*) *M'Cormick* v. *Duke*, (1907) 1 Ir. R. 339.

(*o*) *Burgis* v. *Constantine*, (1908) 2 K. B. 484.

two innocent persons are affected by the fraud of the solicitor or agent, the one who, by signing documents without due caution, although in ignorance, enables the solicitor to commit the fraud, suffers (*p*). So where the mortgagor's solicitor or other agent forges a deed the loss falls on the mortgagor (*q*). And mortgagors cannot impeach a mortgage when by their own conduct they have enabled their manager and banker to mislead the mortgagees by fraudulent representations that their (the mortgagees') money was invested as stated in the mortgage deed (*r*).

Omission of client to inquire as to alleged security.

But the mere omission of a client to make inquiries of his solicitor as to a mortgage on the security of which moneys of the client are represented to have been invested by the solicitor, will not deprive the client of his priority in respect of any charge which he may have over the property, as against a person who, through fraud of the solicitor, has become a purchaser or incumbrancer for value without notice (*s*).

Fraudulent use by solicitor or other agent of deeds deposited for custody.

So where a solicitor, with whom a client had deposited a mortgage for custody, fraudulently indorsed thereon a reconveyance which was never executed by the mortgagee, and induced the mortgagor to mortgage the property to a third person who took without notice; it was held that the first mortgagee had not lost his priority (*t*).

So also, where a person purchased property in the name of a confidential clerk, whose duty it was to put away his employer's securities in a safe, and who executed a declaration of trust in his employer's favour, and subsequently executed an equitable charge of the property and deposited the purchase deed with the mortgagee, representing himself as absolute owner, to secure an advance; it was held that the purchaser had not, by allowing the clerk to have custody of the purchase deed, been guilty of negligence so as to deprive him of his prior equitable title (*u*).

(*p*) *Hiorns* v. *Holton*, 16 Beav. 259; *Hunter* v. *Walters*, *sup.*; *King* v. *Smith*, *sup.*; *Rimmer* v. *Webster*, *sup.*; *Farquharson* v. *King*, *sup.*

(*q*) *Adsetts* v. *Hives*, 33 Beav. 52; *Brocklesby* v. *Temperance Permanent Building Soc.*, (1895) A. C. 173.

(*r*) *London Freehold, &c. Co.* v. *Suffield* (*Baron*), (1897) 2 Ch. 608, C. A.

(*s*) *Re Vernon, Ewens & Co.*, 33 Ch. D. 402, C. A., *inf.*

(*t*) *Cook* v. *Bramwell*, W. N. (1890) 72, C. A. See *Jared* v. *Clements*, (1903) 1 Ch. 428, C. A.

(*u*) *Carritt* v. *Real and Personal Advance Co.*, 42 Ch. D. 263; *Rimmer* v. *Webster*, (1902) 2 Ch. 163.

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Vendor's lien.

A vendor who had executed a conveyance and signed the usual receipt for the purchase-money without receiving any portion of it, in order to enable the purchaser to execute a mortgage to two persons to secure moneys due to them as trustees, was not permitted to set up his lien for unpaid purchase-money, or any advances he might have made, in priority to the mortgage, he having trusted to the word of one of the mortgagees, who was his solicitor, that on a sale he should be paid first (*x*).

Release by mortgagee without payment.

When the owner of a charge executes a release of it without payment, merely to enable a sale to be made of the property, he retains his right to the charge except against persons who purchased on the faith of the release (*y*).

Suppression of settlement.

So, where a voluntary settlement was suppressed with the object of enabling money to be raised by mortgage, the mortgagee was entitled to priority against all the persons who acquiesced in the suppression (*z*). And, coverture being no excuse for fraud, if a wife concurs with her husband in suppressing a settlement from a mortgagee, her interest thereunder will be postponed to the mortgage (*a*).

Mortgagee solicitor or counsel.

The rule that fraudulent representations as to a prior incumbrance or concealment thereof will postpone the security will be applied with especial strictness where the prior incumbrancer is professionally employed by the subsequent mortgagee as solicitor (*b*) or counsel (*c*), and does not disclose his mortgage.

Solicitor taking mortgage in his own name.

Where a solicitor, having moneys of a client for investment, represented that the money had been advanced on mortgage of certain property, but, instead of making such investment, the solicitor took a mortgage in his own name to secure an advance made by himself on the same property, and also on other property, the legal estate in which was outstanding, and he afterwards acquired the equity of redemption in both properties; it was held that the solicitor had made himself constructively a trustee of the security for his client, and that the moneys of

(*x*) *Smith* v. *Evans*, 30 Beav. 445. See *Rimmer* v. *Webster*, *sup.*

(*y*) *Hatchell* v. *Cremorne*, Ll. & G. *t.* Plunket, 236. See *Re Goldburg*, (1912) 1 K. B. 384.

(*z*) *Clark* v. *Hoskins*, 37 L. J. Ch. 561.

(*a*) *Sharpe* v. *Foy*, L. R. 4 Ch. 35. See *Evans* v. *Bicknell*, 6 Ves. 174, at p. 181.

(*b*) *Exp. Hirtzel*, 2 De G. & J. 464.

(*c*) *Draper* v. *Borlase*, 2 Vern. 370.

the latter remained as a subsisting charge on both properties in the hands of a *bonâ fide* purchaser without notice (*d*).

Mortgagee not bound to disclose incumbrance unless asked.

A prior mortgagee is not, however, bound to go out of his way to give notice of his mortgage upon hearing that another person is in treaty with regard to a mortgage, sale, or other dealing with regard to the equity of redemption (*e*).

Mortgagee not postponed by fraud of person not his agent.

The mortgagee will not be affected by the fraudulent dealings of solicitors and others, not being his own duly authorized agents, through whom the transaction is effected, if he has no notice, actual or constructive (*f*).

So, a purchaser or mortgagee in possession of the legal estate is protected, though he claims under a forged will, if without notice of the forgery (*g*). So, also, a mortgagee who makes advances to a person falsely representing himself as heir to the mortgagor, in ignorance of a will (*h*).

Forged mortgage.

But a mortgagee cannot set up a mortgage for value without notice, where the mortgage itself is a forgery (*i*).

Substitution of forged securities.

So where a mortgagee was induced by the mortgagor to release the mortgaged estate in exchange for forged or worthless securities, he lost his priority over a subsequent mortgagee who took without notice of the fraud (*k*).

So a purchaser with notice of a charge which was fraudulently represented, by means of a forged receipt, to be paid off, could not claim to be a purchaser for value without notice, although he had the legal estate and possession of the deeds (*l*).

Opposition to charging order.

The wilful obstruction by an incumbrancer of another creditor in his proceedings to obtain a charging order is not such misconduct as to have the effect of postponing the securities of the former (*m*).

Delay in completion of title.

ii.—Of Laches as affecting a Mortgagee's Priority.—Delay in completing the legal title will not, in the absence of fraud

(*d*) *Re Vernon, Ewens & Co.*, 33 Ch. D. 402, C. A. See *Re Richards, Humber* v. *Richards*, 45 Ch. D. 589; *Stokes* v. *Prance*, (1898) 1 Ch. 212.

(*e*) *Osborn* v. *Lea*, 9 Mod. 97; *Re Lewer*, 5 Ch. D. 61.

(*f*) *Lloyd* v. *Attwood*, 3 De G. & J. 614; *Hunter* v. *Walters*, L. R. 7 Ch. 75; *King* v. *Smith*, (1900) 2 Ch. 425. See *Hartopp* v. *Huskisson*, 55 L. T. 773.

(*g*) *Jones* v. *Powles*, 3 M. & K. 581. But see *Robinson* v. *Briggs*, 1 Sm. & G. 188, 224; *Jared* v. *Clements*, *inf.*

(*h*) *Young* v. *Young*, L. R. 3 Eq. 805.

(*i*) *Re Cooper, Cooper* v. *Vesey*, 20 Ch. D. 611, C. A.

(*k*) *Eyre* v. *Burmester*, 10 H. L. C. 90; *Re Goldburg*, (1912) 1 K. B. 384.

(*l*) *Jared* v. *Clements*, (1903) 1 Ch. 428, C. A.

(*m*) *Shaw* v. *Neale*, 6 H. L. C. 581.

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or negligence, prejudice the right, as where a legal mortgagee of copyholds delayed the inrolment of the conditional surrender until after the inrolment of a subsequent security (*n*).

Non-registration of will.

Negligence in not registering a will, followed by forgery and fraud, is not deemed the proximate cause of the forgery and fraud (*o*).

Non-registration in other cases.

Priority may be lost by omission to register a deed where registration is required by statute (*p*). Similarly, in the case of bills of sale (*q*), mortgages of ships (*r*), and mortgages or charges by companies (*s*).

Assignee of insolvent neglecting to take possession.

In one case (*t*) it was held that a mortgagee, from an insolvent, of copyholds, without notice of the insolvency, had no claim in equity in priority to the title of the assignees, though the assignees, by neglecting to take possession of or sell the premises, and permitting the insolvent to remain in possession, and by omitting to make their entry on the court rolls as directed by the Acts, had enabled the insolvent to commit a fraud upon the mortgagee, and though as many as nineteen years had elapsed since the insolvency. The mortgagee might, no doubt, have searched the list of insolvents, but this is a strong case.

Laches by mortgagee.

Laches in enforcing a mortgagee's rights under his security may deprive him of his priority as against subsequent incumbrancers (*u*). But delay alone does not amount to laches so as to prevent a mortgagee from asserting his right to follow assets (*x*).

Where a trade firm assigned their book debts by way of mortgage, but the mortgagees gave no notice of the assignment to the debtors, and certain puisne incumbrancers perfected their title, by notice to the debtors, it was held that the first mortgagees lost their priority. But the decision turned mainly on the ground that the subsequent incumbrancers had no notice

(*n*) *Horlock* v. *Priestley*, 2 Sim. 75.

(*o*) *Re Cooper, Cooper* v. *Vesey*, 20 Ch. D. 611, at p. 634, C. A. And see *Bank of Ireland* v. *Trustees of Evans' Charities*, 5 H. L. C. 389; *Johnston's Claim*, L. R. 6 Ch. 212; *Baxendale* v. *Bennett*, 3 Q. B. D. 525.

(*p*) *Warburton* v. *Loveland*, 6 Bli. N. S. 1. And see *ante*, pp. 1267 *et seq.*

(*q*) *Ante*, pp. 1309 *et seq.*

(*r*) *Ante*, p. 1311.

(*s*) *Ante*, p. 510.

(*t*) *Cole* v. *Coles*, 6 Ha. 517; cf. *Re Clark, Exp. Beardmore*, (1894) 2 Q. B. 393, C. A.

(*u*) *Searle* v. *Colt*, 1 Y. & C. C. C. 36.

(*x*) *Re Eustace*, (1912) 1 Ch. 561.

of the prior advance when they lent their money and had been the first to perfect their title (*y*).

Mistake.

Mistake arising from negligence may postpone a prior right to the security of a subsequent mortgagee. So where a landlord had executed a lease by mistake at a rent of 130*l.* instead of 230*l.*, a mortgagee from the lessee, without notice of the mistake, was held to be entitled to hold the landlord to the 130*l.* rent (*z*). This case, however, can only be supported on the ground of fraud (*a*).

Section II.

Loss of Priority by Notice of Prior Incumbrances or other Equities.

Protection of legal estate acquired without notice.

i. **Notice as affecting a Mortgagee's Priority generally.**—A mortgagee or purchaser for value without notice, if he has obtained or can obtain the legal estate, is completely protected against prior incumbrancers (*b*), although he paid his money on a false representation of facts (*c*). The *onus* of proving notice lies on the person claiming priority adversely to a mortgagee or purchaser (*d*).

Effect of notice of prior equities, &c.

But no incumbrancer, with notice of prior incumbrances or equities at the time when he lent his money, can obtain any priority by holding or acquiring the legal estate (*e*); and a person who takes a legal mortgage, with notice, actual or constructive, of an infirmity of title, is subject to the equities existing against the title, and if the latter is set aside the mortgage falls also (*f*). These rules apply though the incumbrancer be a married woman or an infant (*g*).

(*y*) *Wigram* v. *Buckley*, (1894) 3 Ch. 483, 495, C. A.

(*z*) *Garrard* v. *Frankel*, 30 Beav. 445.

(*a*) *May* v. *Platt*, (1900) 1 Ch. 616.

(*b*) *Jones* v. *Powles*, 3 My. & K. 581.

(*c*) *Young* v. *Young*, L. R. 3 Eq. 805; *Trinidad Asphalte Co.* v. *Coryat*, (1896) A. C. 587. But see *Jared* v. *Clements*, (1903) 1 Ch. 428, C. A.

(*d*) *Exp. Hardy*, 2 D. & C. 393.

(*e*) *Willoughby* v. *Willoughby*, 1 T. R. 763; *Drew* v. *Lockett*, 32 Beav. 499; *Blackwood* v. *London Chartered Bank of Australia*, L. R. 5 P. C. 92, 111; *Taylor* v. *Russell*, (1892) A. C. 244, 261.

(*f*) *Cookson* v. *Lee*, 23 L. J. Ch. 473, C. A.

(*g*) *Jones* v. *Kearney*, 1 Dr. & War. 134, at p. 166.

Stop order with notice gives no priority.

So a second mortgagee of a fund in Court, who had notice, at the time of his advance, of the existence of a prior mortgage on the same fund, cannot, by obtaining a stop order, gain priority over the first mortgagee, though the latter has not obtained a stop order (*h*).

Where mortgagor has notice, and mortgagee has not.

If a party having notice convey for a valuable consideration to one who has not notice, or if a party not having notice convey to one who has notice, the party taking the conveyance will not, in either case, be affected by the notice; for he may defend himself in the first instance by his want of notice (*i*), and, in the second instance, by the want of notice in the party through whom he claims (*k*). And, therefore, if A., having notice, sells to B., who has not notice, who sells to C., who has notice, B. is protected against the notice in A. by his own want of notice, and C. is defended by the want of notice in B. (*l*). But this doctrine is not to be extended (*m*). In the case of charities within 43 Eliz. c. 4, a purchaser of lands without notice is affected by notice in the person from whom he purchased (*n*).

Protection by legal estate got in without notice.

If a mortgagee or purchaser, having, at the time when he paid his money, no notice of any prior incumbrance or equity, gets in the legal estate, he has a clean title free from all incumbrances previously affecting the property, and can convey the same to a mortgagee or purchaser who has notice of such previous incumbrances, who may shelter himself under the first purchaser for value without notice, otherwise it would much clog the sale of estates (*o*).

Deeds obtained without notice.

On the same principle, an equitable mortgagee by deposit, who has obtained possession of documents of title without notice

(*h*) *Re Holmes*, 29 Ch. D. 786, C. A.

(*i*) *Mertins* v. *Jolliffe*, Amb. 313; *Ferrars* v. *Cherry*, 2 Vern. 384; *Sweet* v. *Southcote*, 2 Bro. C. C. 66; *Lowther* v. *Carlton*, 2 Atk. 138. See *Brandling* v. *Ord*, 1 Atk. 571; *Freer* v. *Hesse*, 4 De G. M. & G. 503.

(*k*) *Harrison* v. *Forth*, Prec. Ch. 51; *Sweet* v. *Southcote*, 2 Bro. C. C. 66; *Andrew* v. *Wrigley*, 4 Bro. C. C. 125; *M'Queen* v. *Farquhar*, 11 Ves. 467, 478; *Procter* v. *Cooper*, 1 Jur. N. S. 149; *Wilkes* v. *Spooner*, (1911) 2 K. B. 473. See *Bates* v. *Johnson*, John. 304; *Spencer* v. *Pearson*, 24 Beav. 266; *Ledbrook* v. *Passman*, 57 L. J. Ch. 855; *The Celtic King*, (1894) P. 175.

(*l*) *Lowther* v. *Carlton*, 2 Atk. 139; *Harrison* v. *Forth*, Prec. Ch. 51; *Bradwell* v. *Catchpole*, 3 Swanst. 78, n.; *Peacock* v. *Burt*, 4 L. J. Ch. 33.

(*m*) *Ante*, p. 1252.

(*n*) Sug. V. & P. (14th ed.) p. 753.

(*o*) *Lowther* v. *Carlton*, 2 Atk. 242. See *Kettlewell* v. *Watson*, 21 Ch. D. 685, at p. 707. And see cases cited *sup.* note (*k*).

of a prior equity affecting them, will be entitled to retain them (*p*).

Getting in legal estate from trustee without notice of trust.

It was formerly thought (*q*) that the legal estate would be no protection if the person conveying the legal estate had notice of an express prior trust or incumbrance; but this view has not been adopted, and it may now be regarded as settled, that if the legal estate is obtained from the trustee *bonâ fide* at the time of the advance, without notice of the trust, it will prevail, though the trustee was acting in fraud of his trust; and the defence will be sustained although the mortgagee, in order to make out his title to the legal estate, has to rely on an instrument which discloses the trust or prior incumbrance, the mortgagee not having notice of such instrument at the time of his advance (*r*).

Getting in legal estate from trustee after notice of trust.

A mortgagee or purchaser cannot protect himself by taking a conveyance of the legal estate from a trustee, if he has himself, at the time of getting in the legal estate, actual or constructive notice of the existence of the trust; for, by taking a conveyance with notice of the trust, he himself becomes the trustee, and must not, to get a plank to save himself, be guilty of a breach of trust (*s*).

But the trust must be a trust in favour of the person against whom the legal estate is set up, and not in favour of third parties (*t*). And it is only when the legal estate has been acquired from a trustee in the proper sense of the term that the acquisition is of no avail (*u*).

So where a trustee knows that he is a trustee, but the equitable incumbrancer does not, the trustee can give no advantage against his *cestui que trust* by assigning the legal estate without consideration (*x*).

Trustee for all incumbrancers must

So, an incumbrancer getting in the legal estate from a person who was trustee for all incumbrancers with notice of their rights

(*p*) *Ashwin* v. *Burton*, 9 Jur. N. S. 319; *Re Valletort Sanitary Laundry Co.*, (1903) 2 Ch. 654.

(*q*) See *Maundrell* v. *Maundrell*, 10 Ves. 246; *Exp. Knott*, 11 Ves. 609; *Carter* v. *Carter*, 3 K. & J. 617; *Sharples* v. *Adams*, 32 Beav. 213.

(*r*) *Pilcher* v. *Rawlins*, L. R. 7 Ch. 259. See *Lloyd* v. *Attwood*, 3 De G. & J. 614; *Hunter* v. *Walters*, L. R. 7 Ch. 75.

(*s*) *Saunders* v. *Dehew*, 2 Vern. 270. See *Harpham* v. *Shacklock*, 19 Ch. D. 207, at p. 214, C. A.; *Taylor* v. *London and County Bank*, (1901) 2 Ch. 231; *Perham* v. *Kempster*, (1907) 1 Ch. 373. See also *Prosser* v. *Rice*, 28 Beav. 74; *Pease* v. *Jackson*, L. R. 3 Ch. 576.

(*t*) *Taylor* v. *Russell*, (1891) 1 Ch. 8.

(*u*) *Ibid.*, (1892) A. C. at p. 261.

(*x*) *Garnham* v. *Skipper*, 55 L. J. Ch. 263.

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gains no priority (*y*); the trustee cannot alter the priorities by conveying the legal estate to one of the incumbrancers (*z*).

not convey legal estate to one.

Cases of constructive trust.

Again, the circumstances of the transaction and the relation of the parties may be such that, though there is no express trust affecting the legal estate, a puisne incumbrancer may not be entitled to protect himself by getting in that estate. So, it was held that, inasmuch as the second equitable mortgagee had, at the time of his acquiring the legal estate, notice of the obligations of his mortgagor to third parties, he could only hold that estate subject to those obligations, though he had originally taken his security without notice (*a*).

Where mortgagor is constructively trustee for prior incumbrancers, &c.

On the same principles, even if an equitable mortgagee has, at the time of the advance, no notice of a prior equity affecting the property, he will gain no priority over the person entitled to the prior equity by getting in the legal estate from the mortgagor after notice that the latter has made himself a trustee for that other person (*b*).

So, where a husband covenanted to settle land, and afterwards deposited the title deeds with his bankers without notice, the settlement prevailed, although the bankers, after notice, got in the legal estate (*c*).

So, also, an equitable incumbrancer cannot avail himself of the exercise of a legal power by the mortgagor if he has notice of an agreement by the latter not to exercise it to the prejudice of the first mortgagee (*d*).

Trustee cannot confer priority by fraud.

The fraudulent act of a trustee cannot confer any equitable title as against the *cestui que trust* (*e*). A trustee under a will, being also trustee under a settlement, induced his co-trustee under the will to transfer stock, subject to the trusts of the will, into his sole name, in exchange for a forged mortgage, the

(*y*) *Sharples* v. *Adams*, 32 Beav. 213; *Saunders* v. *Dehew*, 2 Vern. 270; *Ortigosa* v. *Brown*, 47 L. J. Ch. 168; *Heath* v. *Crealock*, L. R. 10 Ch. 22; *Blennerhasset* v. *Day*, 2 Ba. & Be. 104, 133.

(*z*) *Sharples* v. *Adams*, *sup.*; *Maxfield* v. *Burton*, L. R. 17 Eq. 15; *Harpham* v. *Shacklock*, 19 Ch. D. 207, C. A.

(*a*) *Allen* v. *Knight*, 11 Jur. 527.

(*b*) *Mumford* v. *Stohwasser*, L. R. 18 Eq. 556, 563; *Perham* v. *Kempster*, (1907) 1 Ch. 373.

(*c*) *Manningford* v. *Toleman*, 1 Coll. 670. See *Baillie* v. *McKewan*, 35 Beav. 177.

(*d*) *Hurst* v. *Hurst*, 16 Beav. 372.

(*e*) *Cory* v. *Eyre*, 1 De G. J. & S. 149; *Shropshire Union Rail. Co.* v. *The Queen*, L. R. 7 H. L. 496; *Taylor* v. *London and County Banking Co.*, (1901) 2 Ch. 231, C. A. See also *Re Morgan*, *Pillgrem* v. *Pillgrem*, 18 Ch. D. 93, C. A.; *Bourke* v. *Lee*, (1904) 1 Ir. R. 280. *Secus*, if the charge is given by the trustee within the scope of his authority. See *post*, p. 1393.

stock to be held by him on the trusts of the settlement; *semble*, the *cestuis que trust* under the will did not lose their right to the stock (*f*).

Where original mortgagee has notice, but transferee has not.

It seems that if a mortgagee, who is himself precluded by notice from obtaining priority by getting in the legal estate, transfers or sub-mortgages his security to a person without notice, the latter will be affected by the disability. It is laid down in Bacon's Abridgment (*g*), on the authority of a case in Vernon (*h*), that if one take a mortgage by assignment from a mortgagee affected with notice of an outstanding title, he will take subject to that title; for his assignor cannot transfer to him a better title than he has himself.

Plea of purchase without notice before the Judicature Acts.

ii.—As to pleading Purchase for Value without Notice.—The plea of purchase for valuable consideration without notice was never, and is not now, available as against a plaintiff who has established his title as legal mortgagee, and claims priority by virtue thereof, for, as has been seen, where equities are equal, the law must prevail (*i*). But before the Judicature Act, 1873 (*k*), if a plaintiff, claiming under a legal title, which he was unable to prove by reason of absence of title deeds or otherwise, brought a suit in a Court of Equity for discovery, it was open to the defendant to set up a plea of purchase for value without notice, and the Court would not grant its aid, as against such a purchaser, in favour of a claimant who had no better equity, and must be left to his remedy, if any, at law (*l*).

Effect of this enactment.

A plea of purchase for valuable consideration without notice was not, however, even before the Judicature Act, 1873, available against either discovery or relief, in cases in which the Court of Chancery had concurrent jurisdiction with Courts of Law upon legal titles (*m*). And now a plaintiff claiming under a legal title as mortgagee or otherwise, which he is not in a position to prove without the aid of the auxiliary jurisdic-

(*f*) *Case* v. *James*, 3 De G. F. & J. 256.

(*g*) Bac. Abr. (7th ed.) vol. viii. p. 270. But see *ante*, p. 1326.

(*h*) *Walley* v. *Walley*, 1 Vern. 484. See *Earl of Pomfret* v. *Lord Windsor*, 2 Ves. Sen. 472, 485; *Ford* v. *White*, 16 Beav. 120.

(*i*) *Ante*, p. 1242.

(*k*) 36 & 37 Vict. c. 66.

(*l*) *Wallwyn* v. *Lee*, 9 Ves. 24; *Joyce* v. *De Moleyns*, 2 J. & L. 374; *Att.-Gen.* v. *Wilkins*, 17 Beav. 285; *Gait* v. *Osbaldeston*, 1 Russ. 158.

(*m*) *Williams* v. *Lambe*, 3 Bro. C. C. 264; *Collins* v. *Archer*, 1 R. & My. 292; *Phillips* v. *Phillips*, 4 De G. F. & J. 217.

tion of the Court, so as to enable him to compel discovery, may invoke that aid; and the plea of purchase for value without notice will not be available to the defendant as an answer to the incidental claim of the plaintiff, any more than it would formerly have been, or would now be, to the plaintiff's substantive claim to establish his priority by virtue of his legal title. Notwithstanding the plea, therefore, the defendant will be ordered to make discovery and produce the documents of title (*n*), and, if such documents should establish the title, to deliver them to the plaintiff (*o*).

How the defence should be pleaded.

Under the former practice the defence of purchase for valuable consideration without notice might have been set up by plea or demurrer (*p*); it may now be set up as a ground of equitable defence to the action, and relief may be granted thereon in all Divisions of the High Court (*q*). The alteration is one of procedure, and does not give to defendants any new rights to set up the defence in cases in which they could not formerly have done so, nor give any new or extended effect to the defence; and, as has been seen (*r*), the defence is no longer available in some cases, where it would formerly have been so.

In the absence of fraud or estoppel it can only be set up against a prior equitable incumbrancer when the purchaser has the legal estate or the best right to call for it (*s*).

The defence of purchase for value must be formally pleaded as a fact (*t*); but if it is a fair inference from the facts alleged, that, it seems, will be sufficient (*u*). An objection taken orally is not sufficient (*x*).

It is sufficient in the action to allege notice without entering into details (*y*). Where the notice is verbal, it is a question for the jury (*z*).

(*n*) *Ind, Coope & Co.* v. *Emmerson*, 12 App. Ca. 300.

(*o*) *Re Cooper, Cooper* v. *Vesey*, 20 Ch. D. 611, C. A.; *Manners* v. *Mew*, 29 Ch. D. 725, C. A.; *Re Ingham, Jones* v. *Ingham*, (1893) 1 Ch. 352, 361.

(*p*) Demurrers are now abolished. See R. S. C. Ord. XXV. r. 1.

(*q*) Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 24, sub-s. 2.

(*r*) *Ante*, p. 1266.

(*s*) *Taylor* v. *London and County Bank*, (1901) 2 Ch. 231, C. A.

(*t*) *Vane* v. *Vane*, L. R. 8 Ch. 383. See R. S. C. Ord. XIX. r. 15.

(*u*) *Taylor* v. *Blakelock*, 32 Ch. D. at p. 564.

(*x*) *Phillips* v. *Phillips*, 4 De G. F. & J. 208.

(*y*) R. S. C. Ord. XIX. r. 23.

(*z*) *Edwards* v. *Scott*, 1 Man. & Gr. 962.

Denial of notice must be made although not charged, and must not be evasive (*a*).

Evidence.

The evidence of a single witness will not suffice against a positive denial of notice, but the question of credit may make an exception to the rule (*b*).

Solicitor's lien.

This defence has been held not to apply to the case of a solicitor's lien as against a prior mortgagee or purchaser (*c*).

iii.—**Actual and Constructive Notice.**—Notice may be either express or constructive. "Notice" and "knowledge," in legal parlance, include not only express notice, but knowledge, or the means of knowledge, to which a person wilfully shuts his eyes (*d*).

Distinction between actual and constructive notice.

Express notice is actual knowledge of a particular fact, formally communicated in writing or by word of mouth. Constructive or implied notice may be defined to be knowledge which the Courts impute to a person from the circumstances of the case upon a legal presumption so strong that it cannot be allowed to be rebutted that the knowledge must exist though it may not have been formally communicated (*e*).

Whether notice be express and explicit, or rest on rumour or on general claim, a purchaser or mortgagee can never be advised to disregard it, or to accept the title without an inquiry into the nature of the demand (*f*).

Requisites to effectual notice.

Notice, in order to bind the person to whom it is given, must be given to him in the character in which such notice is intended to affect him, and not in any other character (*g*).

Notice must be in connection with the transaction.

Notice, whether express or constructive, will not be effectual to bind the recipient, unless given in the course of and in connection with the transaction in respect of which it is intended to operate. Notice given in the course of an antecedent and independent transaction will not be sufficient. In reference to this point Lord Redesdale remarked: "If a man purchase an estate under a deed, which happens to relate also to other lands

(*a*) R. S. C. Ord. XIX. r. 19.

(*b*) *Evans* v. *Bicknell*, 6 Ves. 184; *East India Co.* v. *Donald*, 9 Ves. 275, 283.

(*c*) *Smith* v. *Chichester*, 2 Dr. & War. 393.

(*d*) Per Lord Wensleydale in *May* v. *Chapman*, 16 M. & W. 361. See *Jones* v. *Gordon*, 2 App. Ca. 625.

(*e*) See *Hewitt* v. *Loosemore*, 9 Ha. 449; *Plumb* v. *Fluitt*, 2 Anst. 432.

(*f*) See *Fry* v. *Porter*, 1 Mod. 311; *Butcher* v. *Stapely*, 1 Vern. 363.

(*g*) *Beioley* v. *Carter*, 17 W. R. 130.

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not comprised in that purchase, and afterwards purchase the other lands to which an apparent title is made independent of that deed, the former notice of the deed will not of itself affect him in the second transaction; for he was not bound to carry in his recollection those parts of a deed which had no relation to the particular purchase in which he was then engaged, nor to take notice of more of the deed than affected his then purchase" (*h*).

What amounts to constructive notice.

It is difficult to lay down general rules as to what will or will not be constructive notice; but it is an established principle that whatever is sufficient to put a person upon inquiry is good notice (*i*).

Principle of the doctrine.

Lord Cranworth stated the principle governing the doctrine of constructive notice to be, that the question, when it is sought to affect a person with constructive notice, is not whether he had the means of obtaining, and might by prudent caution have obtained, the knowledge in question, but whether the not obtaining it was an act of gross or culpable negligence (*k*).

Application of the principle limited by Conv. Act, 1882.

The application of the principle was in some cases carried rather far, but the general tendency of the Courts has been to regard it as highly inexpedient to extend the doctrine of constructive notice (*l*); and its undue extension is now prevented by sect. 3 of the Conveyancing Act, 1882 (*m*), which enacts as follows:—

Restriction on constructive notice.

Sect. 3.—"(1.) A purchaser shall not be prejudicially affected by notice of any instrument, fact, or other thing unless

"(i.) It is within his own knowledge or would have come to his knowledge if such inquiries and inspections had been made as ought reasonably to have been made by him; or

"(ii.) In the same transaction with respect to which a question of notice to the purchaser arises, it has come to the knowledge of his counsel, as such, or of his solicitor or other agent, as such, or would have come to the knowledge of his solicitor, or other agent, as such, if such inquiries and inspections had been made as ought

(*h*) *Hamilton* v. *Royse*, 2 Sch. & L. 315, 327.

(*i*) *Taylor* v. *Stibbert*, 2 Ves. Jun. 437; *Willoughby* v. *Willoughby*, 1 T. R. 769; *Hiern* v. *Mill*, 13 Ves. 114; *Hall* v. *Smith*, 14 Ves. 426; *Daniels* v. *Davison*, 16 Ves. 249; 17 Ves. 433; *Brunton* v. *Neale*, 9 Jur. 338, L. C.

(*k*) *Ware* v. *Lord Egmont*, 4 De G. M. & G. 473. See *Bailey* v. *Barnes*, (1894) 1 Ch. 25, 31, C. A.

(*l*) *Ware* v. *Lord Egmont*, *sup.*; *Wyllie* v. *Pollen*, 3 De G. J. & S. 596; *Banco de Lima* v. *Anglo-Peruvian Bank*, 8 Ch. D. 160, 175.

(*m*) 45 & 46 Vict. c. 39.

reasonably to have been made by the solicitor or other agent.

"(2.) This section shall not exempt a purchaser from any liability under, or any obligation to perform or observe, any covenant, condition, provision, or restriction contained in any instrument under which his title is derived, mediately or immediately; and such liability or obligation may be enforced in the same manner and to the same extent as if this section had not been enacted.

"(3.) A purchaser shall not by reason of anything in this section be affected by notice in any case where he would not have been so affected if this section had not been enacted.

"(4.) This section applies to purchases made either before or after the commencement of this Act, save that where an action was pending at the commencement of the Act the rights of the parties shall not be affected by this section."

The section really does no more than state the law as it was before, but its negative form shows that a restriction rather than an extension of the doctrine of notice was intended (*n*). The words "ought reasonably" do not impose a duty or obligation; they mean as a matter of prudence having regard to what is usually done by men of business under similar circumstances (*o*). The section protects a person who does not make inquiry where no inquiry would have brought the fact in question to his knowledge (*p*).

Rules laid down in *Jones* v. *Smith*.

As regards constructive notice in cases falling within subsect 1 (i) of this section, the following rules are laid down by Sir J. Wigram, V.-C., in the well-known case of *Jones* v. *Smith* (*q*):—The cases in which constructive notice has been established resolve themselves into two classes. First, cases in which the party charged has had actual notice that the property in dispute was in fact charged, incumbered, or in some way affected, and the Court has thereupon bound him with constructive notice of facts and instruments to a knowledge of which he would have been led by an inquiry after the charge, incumbrance, or other circumstance affecting the property of which he had actual notice; and, secondly, cases in which the Court has been satisfied from the evidence before it that the party charged had designedly abstained from inquiry for the very purpose of avoiding notice.

(*n*) *Bailey* v. *Barnes*, (1894) 1 Ch. at p. 35, per Lindley, L.J.

(*o*) *Ibid.*

(*p*) *Taylor* v. *London and County Banking Co.*, (1901) 2 Ch. 231, C. A.

(*q*) 1 Ha. 43, 55.

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Notice of mortgage of equity of redemption.

The risks to which a person is exposed who lends money on the security of a mortgage of the equity of redemption, and the precautions which should be adopted in order as far as possible to obviate such risks, have been adverted to in a previous chapter (*r*). Notice of the second charge would prevent the first mortgagee from tacking a future advance of his own against the second incumbrancer. Such notice should be formal and in writing for sake of certainty and facility of proof, and in the majority of cases be preserved with the deeds.

Indorsement of notice.

In order, however, effectually to bind persons claiming under the first mortgagee, indorsement of such notice on the leading title deeds is advisable, such as on the first mortgage and the last conveyance. Such indorsement would effectually prevent the improper use of the title deeds to the prejudice of a second mortgagee. Of course, however, the first mortgagee cannot be compelled to permit such indorsement.

Other cases in which notice should be indorsed on documents of title.

Indorsement also is advisable in other cases where the mortgagee, although with the legal estate, cannot obtain possession of the title deeds: as on a mortgage of an undivided estate or a remainder (*s*); where a man grants an annuity; where the owner only mortgages part of a large estate; or where trustees are raising money, but the nature of the trust requires the retention of the deeds.

Though the want of such indorsement would not cause a postponement of the security, it would be a prudent act, and be beneficial and a saving of costs to all parties (*t*). Such indorsement is also advisable where a first mortgagee parts with the deeds to the mortgagor even for a temporary purpose (*u*).

Constructive notice from title deeds.

iv.—Notice of a Deed is Notice of its Contents.—Actual notice of a deed forming a material part of the title will fix a mortgagee or purchaser with constructive notice of any incumbrances, liabilities or equities affecting the property to a knowledge of which he would reasonably be led by inspecting that deed.

Notice of deed is notice of its contents;

It is a settled maxim of law that notice of a deed is notice of its contents; or, in other words, that where a mortgagee or

(*r*) *Ante*, pp. 54 *et seq.*

(*s*) Dav. Conv. (4th ed.) vol. ii. pt. 2, p. 252.

(*t*) *Harper* v. *Faulder*, 4 Madd. 129, 134.

(*u*) *Perry-Herrick* v. *Attwood*, 2 De G. & J. 21.

purchaser cannot make out a title but by a deed of which he has actual notice by production or otherwise, he will be deemed to be affected with constructive notice of any charge, incumbrance, or other matter affecting the property which appears expressly on the face of that deed or is reasonably to be inferred from its contents, for it is *crassa negligentia* that he sought not after the facts (*x*).

and of facts stated or to be inferred.

Actual notice of a deed is thus constructive notice not only of its contents, but also of all material facts which would have been necessarily obtained by its production and perusal (*y*).

Constructive notice from description, &c. of parties.

Constructive notice will be imputed if the parties to the deed or their descriptions are such as to put the mortgagee or purchaser on inquiry; thus, where a person purported to grant real estate as heir-at-law, the concurrence in the conveyance of persons interested as devisees was held to affect the grantee with constructive notice of the will under which they claimed (*z*).

Concurrence of wife in conveyance by husband.

So, where a husband and wife joined in demising property, the fact of her being a party to the deed was held notice of her title under a will whereby the property was given to the wife for life for her separate use with a restraint on anticipation (*a*).

Renewal of lease by different lessor.

Where, upon the renewal of a lease, the lessor is not the same person as he who granted the original lease, this is sufficient to render necessary inquiry into the title, and would be constructive notice of a trust (*b*).

Constructive notice from recitals, &c.

Again, reference in the recitals or in any other part of a deed of which a mortgagee or purchaser has actual notice, will affect him with constructive notice of any other deed or fact thus referred to.

General recital as to incumbrances.

A general recital in a deed that there were existing mortgages on the property was held to be sufficient to affect a party claiming under that deed with notice of the nature, amount and extent of the recited mortgages (*c*). But in one case it was held that the fact of a mortgage being made "subject to exist-

(*x*) *Moore* v. *Bennett*, 2 Ch. Ca. 246; *Bacon* v. *Bacon*, Tothill, 133; *Ingram* v. *Pelham*, Amb. 153; *Hamilton* v. *Royse*, 2 Sch. & L. 315. See *Coppin* v. *Fernyhough*, 2 Bro. C. C. 291; *Leigh* v. *Lloyd*, 2 De G. J. & S. 330; *Feilden* v. *Slater*, L. R. 7 Eq. 523.

(*y*) *Peto* v. *Hammond*, 30 Beav. 493.

(*z*) *Burgoyne* v. *Hatton*, Barn. Ch. R. 237; *Att.-Gen.* v. *Hall*, 16 Beav. 388.

(*a*) *Steedman* v. *Poole*, 6 Ha. 193.

(*b*) *Att.-Gen.* v. *Hall*, 16 Beav. 388.

(*c*) *Farrow* v. *Rees*, 4 Beav. 18; *Lacey* v. *Ingle*, 2 Ph. 413; *Gibson* v. *Ingo*, 6 Ha. 124.

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ing incumbrances" did not affect the mortgagee with notice of a prior equitable charge, which was in fact unknown to him, and which, as it appeared, was not in the contemplation of the mortgagor, nor intended by him to be included (*d*).

Reference to particular incumbrances.

If a mortgagee or purchaser has notice of an instrument affecting the title, he has notice of any mortgages, charges, or equities affecting the property, and referred to in the instrument (*e*). In such a case the incumbrancer ought to have seen the deed of which he had notice, and that would have led him to the other deeds, in which, pursued from one to the other, the whole case must have been discovered to him (*f*). So, if a second mortgagee have notice of a prior mortgage, he has notice of any incumbrances, subject to which the first mortgage is made, and his mortgage is considered as made subject to the same (*g*).

Notice as to incumbrance by inaccurate reference as to its nature

A mortgagee or purchaser will be affected with notice of existing incumbrances, though the deed of which he has actual notice recites their nature inaccurately, if he could have ascertained the truth by inquiry or inspection of the instrument referred to in the deed (*h*). So, where a will was inaccurately recited, it was held that the purchaser had notice of the true contents of the will (*i*).

or amount.

Similarly, notice of a charge, the amount of which is inaccurately stated, or is stated to be subject to an indefinite increase, is constructive notice of the real amount charged (*k*).

No notice, if no means of ascertaining truth.

But a person cannot reasonably be expected to know more of an instrument, whose production he cannot enforce, than what is given by the recital itself (*l*).

Notice of lease is notice of lessor's title.

It is a general rule that a mortgagee or purchaser of leaseholds has notice, not only of the contents of the lease under

(*d*) *Greenwood* v. *Churchill*, 6 Beav. 314.

(*e*) *Coppin* v. *Fernyhough*, 2 Bro. C. C. 291; *Davies* v. *Thomas*, 2 Y. & C. Ex. 234; *Eyre* v. *Dolphin*, 2 Ba. & Be. 290. See *Hamilton* v. *Royse*, 2 Sch. & L. 315; *Parker* v. *Brooke*, 9 Ves. 583; *Nixon* v. *Robinson*, 2 J. & L. 14; *Roddy* v. *Williams*, 2 J. & L. 1; *Barber* v. *Brown*, 3 Jur. N. S. 18. But see Sug. V. & P. 776.

(*f*) *Bisco* v. *Earl of Banbury*, 1 Ch. Ca. 287; *Davis* v. *Hutchings*, (1907) 1 Ch. 356.

(*g*) *Eland* v. *Eland*, 4 My. & Cr. 420.

(*h*) *Taylor* v. *Baker*, 5 Pri. 306. See *Trinidad Asphalte Co.* v. *Corryat*, (1896) A. C. 587, P. C.

(*i*) *Hope* v. *Liddell*, 21 Beav. 183. See *Penny* v. *Watts*, 1 Mac. & G. 150; *Clare Hall* v. *Harding*, 6 Ha. 273.

(*k*) *Gibson* v. *Ingo*, 6 Ha. 112. See *Jones* v. *Williams*, 24 Beav. 47; *Hynes* v. *Reddington*, 10 Ir. Ch. R. 206.

(*l*) *Brown* v. *Tanner*, L. R. 3 Ch. 597.

which the property is held, but has also notice of the title of the lessor, and the statutory provision (*m*) precluding a purchaser under an open contract from inquiring as to the lessor's title will not protect the mortgagee or purchaser from not investigating that title; he will, therefore, have constructive notice of every deed forming part of the chain of that title, and of any restrictive covenants in any such deed, notwithstanding the most express representation on the part of the mortgagor or vendor that the property is subject to no such restrictive covenants or otherwise prejudicially affected (*n*). Of course it may often be difficult or impossible to obtain production of a lessor's title, and it might perhaps be suggested that the inspection of that title is not one which ought "reasonably" to be made; but, inasmuch as the documents forming that title must necessarily relate to the property in question, it seems clear if a mortgagee or purchaser dispenses with its production, he does so at his own risk (*o*).

No notice of merely collateral agreement.

A mortgagee or purchaser will not, however, be affected with constructive notice of a merely collateral agreement affecting the property entered into between the lessor and a third person, but not referred to in any document forming part of the chain of the lessor's title (*p*).

Notice of covenants.

On the mortgage or sale of a lease containing unusual and onerous covenants, the mortgagor or vendor must either give express notice of them, or must, in order to affect the purchaser with notice, show that he gave him such an opportunity of acquainting himself with the terms of the lease under such circumstances that he ought reasonably to have done so (*q*).

Notice of underlease is notice of covenants, &c. of head lease.

Similarly, the mortgagee or purchaser of property held under an underlease has constructive notice of all usual covenants in the head lease, and also of all unusual covenants if he has a fair opportunity of ascertaining what they were (*r*). A person who accepts an underlease without inquiring into

(*m*) 37 & 38 Vict. c. 78, s. 2, sub-s. 1.

(*n*) *Patman* v. *Harland*, 17 Ch. D. 353. See *Nicoll* v. *Fenning*, 19 Ch. D. 258; *Clacton-on-Sea Hotel Co.* v. *Aberdeen*, W. N. (1888) 54. As to notice of restrictive covenants generally, see *Tulk* v. *Moxhay*, 2 Ph. 774; *Doherty* v. *Allman*, 3 App. Ca. 709.

(*o*) *English & Scottish Mercantile Investment Trust* v. *Brunton*, (1892) 2 Q. B. 700, C. A.

(*p*) *Carter* v. *Williams*, L. R. 9 Eq. 678; cf. *Re Valletort Sanitary Laundry Co.*, (1903) 2 Ch. 654.

(*q*) *Molyneux* v. *Hawtrey*, (1903) 2 K. B. 487, C. A.

(*r*) *Hyde* v. *Warden*, 3 Ex. D. 72; *Reeve* v. *Berridge*, 20 Q. B. D. 523.

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the superior title is guilty of such negligence as disentitles him to relief (*s*). But a vendor of leasehold property must disclose onerous and unusual covenants, or at least afford the purchaser an opportunity of inspecting the leases (*t*). And where the land is in the possession of a derivative lessee, the purchaser is not, it seems, affected with constructive notice of a special covenant contained in the original lease (*u*).

Notice of tenancy.

A tenant's occupation of property mortgaged is notice to the mortgagee of the rights of the tenant, but not of his lessor's title or rights. But actual knowledge that the rents are paid to some person whose receipt is inconsistent with the title of the mortgagor is notice of such person's rights (*x*).

Lease of charity lands.

If a lease be made of charity lands which is set aside as improvident, it seems that a *bonâ fide* mortgagee or purchaser of a sub-lease will not be supposed to have notice of that fact (*y*), which depends on a number of extraneous circumstances; though the purchaser of a charity lease is bound, if the improvidence of the lease appears on the face of it, and does not depend on extraneous circumstances (*z*).

Constructive notice of equities under settlements,

Where a mortgagee or purchaser has notice of a settlement, he has notice of all equities arising under that settlement. Thus, where a lease recited that the lessor was seised in fee upon trust for certain named persons, it was held that the lessee was affected with particulars of the trust (*a*). So, generally, if a person has notice that the legal estate is vested in a trustee, he will be affected with constructive notice of the nature and terms of the trust, for it is open to him to make inquiries of the trustee, and, if he omits to do so, it will be at his own risk (*b*).

or under prior instruments referred to.

Similarly, where a settlement of real estate recited a conveyance of the property to the settlor, and that conveyance recited a will devising the property upon trust for sale, it was held that persons claiming under the settlement had construc-

(*s*) *Imray* v. *Oakshette*, (1897) 2 Q. B. 218, C. A.

(*t*) *Re Haedicke and Lipski*, (1901) 2 Ch. 666.

(*u*) See *Hanbury* v. *Lichfield*, 2 My. & K. 629, 633.

(*x*) *Hunt* v. *Luck*, (1902) 1 Ch. 428, C. A.; *post*, p. 1345.

(*y*) *Att.-Gen.* v. *Backhouse*, 17 Ves. 283.

(*z*) *Att.-Gen.* v. *Pargeter*, 6 Beav. 150.

(*a*) *Malpas* v. *Ackland*, 3 Russ. 273. See also *Hennessey* v. *Bray*, 33 Beav. 96.

(*b*) *Anon.*, Freem. Ch. 137, c. 171.

tive notice of the will, and were bound by the vendor's lien of the trustees for sale for unpaid purchase-money (*c*).

So the mortgagee of a lease, wherein was recited the surrender of a former lease made in consideration of the surrender of an earlier lease, which showed certain facts, was held to have notice of them (*d*).

Notice of post-nuptial settlement.

Where a purchaser or mortgagee has notice that a settlement was not framed according to prior articles, or the rules of equity in regard to the form of such instruments, he will be affected by notice of the equities which arise under them, unless a long period has elapsed (*e*).

Joint account.

Where a mortgage to trustees, in order to keep the trusts off the face of the deed, according to the usual practice, recites that the money advanced belongs to the persons who are in fact trustees on a joint account, a purchaser may rely on the recital, and will not be affected with constructive notice of any trust (*f*), even though the mortgage is in immediate and suggestive sequence to the exercise of a trust for sale and the parties to the two transactions are the same (*g*). But if the trusts are disclosed, accidentally or otherwise, and it appears that the mortgagees were not the original trustees, the purchaser is entitled to require the vendor to show that the mortgagees were duly appointed trustees (*h*).

Charge paid off.

So also if a deed discloses a charge and recites that it has been paid off, the mortgagee should require strict proof to verify the recital (*i*).

Debenture.

But notice of a debenture arising by virtue of its registration is not notice of its contents so as to affect a person dealing with the company with notice of any restriction therein contained on its power to deal with its assets (*k*).

Imputation of notice of contents of all

v.—Constructive Notice of Matters affecting the Title.—So far, the doctrine of constructive notice has been considered

(*c*) *Davies* v. *Thomas*, 2 Y. & C. Ex. 234.

(*d*) *Coppin* v. *Fernyhough*, 2 Bro. C. C. 291. See *Bisco* v. *Earl of Banbury*, 1 Ch. Ca. 291.

(*e*) *Senhouse* v. *Earle*, Amb. 285; *Thompson* v. *Simpson*, 1 Dr. & War. 459; *Davies* v. *Davies*, 4 Beav. 54. See Sug. V. & P. 781.

(*f*) *Re Harman and Rickmansworth Rail. Co.*, 24 Ch. D. 720, 726.

(*g*) *Re West and Hardy*, (1904) 1 Ch. 145; *ante*, p. 552.

(*h*) *Re Blaiberg and Abrahams*, (1899) 2 Ch. 340.

(*i*) *Howard* v. *Chaffers*, 2 Dr. & S. 236; *Jared* v. *Clements*, (1903) 1 Ch. 428, C. A.

(*k*) *Wilson* v. *Kelland*, (1910) 2 Ch. 360.

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material documents of title.

with reference to cases in which a document of title produced to a mortgagee for his inspection puts him upon inquiry as to other deeds or facts referred to therein. But the doctrine is of wider application, and inasmuch as, in all cases where realty is mortgaged, and in many cases in which personalty is mortgaged, the mortgagee has, or must be taken to have, actual knowledge that the competence of the mortgagor to convey the property depends upon documents of title, he will be presumed to have examined every document which directly or inferentially forms a part of that title, and he will be affected with constructive notice of all facts or matters which would have been disclosed to him if the title had been fully investigated (*l*).

Mortgagee should require a reasonably complete title.

A mortgagee, unlike a purchaser under an open contract which is specifically enforceable, is, of course, entitled to make any demands as to production of title which he may think proper as a condition to completing his advance; but it will be sufficient to protect him from the consequences of constructive notice if he makes such inquiries and inspections "as ought reasonably to have been made by him" (*m*).

What is a complete title.

The documents of title produced for inspection or abstracted ought to show a perfect or complete title, that is to say, they ought to show that the mortgagor is either himself competent to convey to, or can otherwise procure to be vested in, the mortgagee, the legal and equitable estates free from incumbrances (*n*).

Notice of appointments under powers.

Notice is imputed of whatever may concern the execution of a power or the revocation thereof (*o*), and of improper dealings with an estate in the professed exercise of a power where suspicious circumstances are apparent (*p*); and where the appointees of a tenant for life had notice of a mortgage which contained a covenant by the appointor with the mortgagee not to exercise the power to his prejudice, they were postponed to him (*q*).

Payment to father and

If an appointment be made by a father, under a power to

(*l*) *West* v. *Reid*, 2 Ha. 249, 260. See *Penny* v. *Watts*, 1 Mac. & G. 150.

(*m*) 45 & 46 Vict. c. 39, s. 3, set out *ante*, p. 1332. See *Bailey* v. *Barnes*, (1894) 1 Ch. 25, C. A.

(*n*) Dart, V. & P. (7th ed.) vol. i. p. 317. See *Morley* v. *Cook*, 2 Ha. 106, 111.

(*o*) *Lord of Banbury's Case*, Freem. Ch. 8; *Robinson* v. *Briggs*, 1 Sm. & G. 188.

(*p*) *Robinson* v. *Briggs*, *sup.*

(*q*) *Hurst* v. *Hurst*, 16 Beav. 372.

son on appointment.

appoint the estate to one or more of his children, to one of his sons in fee, and a conveyance be afterwards executed by father and son in consideration of a sum of money stated in the purchase deed to be paid to both, although the contract was entered into by the father alone before the appointment to the son, the purchaser will not be affected with notice of fraud, in the absence of all evidence to show that the son was not to receive a due proportion of the purchase-money (*r*), to the application of which the purchaser *is not* bound to look.

Notice from irregularity in execution, &c. of deed.

Moreover, notice will be imputed if anything appears on a deed of which a mortgagee or purchaser has notice which is out of the ordinary course; as, for instance, if there is anything peculiar about the attestation (*s*), or if, in a deed executed before the 1st January, 1882, no receipt for the consideration is indorsed, or if such receipt is indorsed in an unusual position; any such circumstance affords sufficient grounds for suspicion to put a mortgagee or purchaser on inquiry, and to affect him with constructive notice of any fraud which might have been disclosed by such inquiry (*t*). But notice will not be imputed of collateral facts and matters *dehors* the deed (*u*).

Attestation of deed.

Notwithstanding an old case (*x*), in which it was decided that if a first mortgagee be a witness to the second mortgage deed, it is sufficient notice to bind him, although it does not appear that he actually knew the contents; the bare attestation of a deed will not, without other circumstances, be sufficient to bind a party with notice of its contents (*y*).

No notice of documents not connected with the title.

But although a mortgagee or purchaser must be presumed to have investigated every instrument which directly or by inference forms a link in the title to the property, he is not affected with constructive notice of instruments which are not neces-

(*r*) *M'Queen* v. *Farquhar*, 11 Ves. 467; *Att.-Gen.* v. *Backhouse*, 17 Ves. 283. See *Warde* v. *Dickson*, 5 Jur. N. S. 698; *Bainbrigge* v. *Browne*, 18 Ch. D. 188.

(*s*) *Kennedy* v. *Green*, 3 My. & K. 699.

(*t*) *Robinson* v. *Briggs*, 1 Sm. & G. 188. See now 44 & 45 Vict. c. 41, ss. 54, 55; *ante*, p. 119.

(*u*) *Att.-Gen.* v. *Backhouse*, 17 Ves. 283; *Darlington* v. *Hamilton*, Kay, 550; *Grosvenor* v. *Green*, 5 Jur. N. S. 517; *Greenslade* v. *Dare*, 20 Beav. 284; *Clements* v. *Welles*, 35 Beav. 513.

(*x*) *Mocatta* v. *Murgatroyd*, 1 P. Wms. 393.

(*y*) *Beckett* v. *Cordley*, 1 Bro. C. C. 357; *Welford* v. *Beezely*, 1 Ves. Sen. 6; *Harding* v. *Crethorn*, 1 Esp. 56; *Reed* v. *Williams*, 5 Taunt. 257; *Rancliffe* v. *Parkyns*, 6 Dow, 224; *Biddulph* v. *St. John*, 2 Sch. & L. 521, 532. See Sug. V. & P. (14th ed.) p. 781.

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sary to or presumptively connected with the title only because, by possibility, they may affect it (*z*).

Notice of intended deed.

Notice of an intention to execute a deed which at the time is only in preparation will, apparently, not be sufficient notice of the deed if afterwards executed (*a*).

Presumption of notice may be rebutted.

Constructive notice will not always be presumed in opposition to direct proof that no notice existed (*b*); and false answers to inquiries may dispense with further inquiry (*c*); but only if the inquiries relate to deeds which may or may not affect the title; for if a person knows of a deed which must necessarily affect the property, it is no answer to be told that it does not prejudicially affect the title, as he is bound to look at it, and if he does not look at it, he will be taken to have constructive notice of its contents (*d*).

Partial information.

Partial information, as that there are some charges, renders further inquiry as to the nature and amount of such charges indispensable (*e*). If a purchaser or mortgagee is informed that the property is subject to charges, he will take subject to all charges, whether he had express notice of them or not (*f*).

Length of title required.

Formerly, it was considered generally sufficient if the title commenced sixty years back, and in the case of an advowson, it was, and still is, the practice to require the title to be carried back for one hundred years (*g*).

But by the Vendor and Purchaser Act, 1874 (*h*), in the case of a purchase under an open contract, forty years is substituted for sixty years as the root of title, but so that earlier title than forty years may be required in cases similar to those in which an earlier title than sixty years might formerly have been required.

What is a proper root of title.

The deed which forms the commencement of title should, however, be one which purports to deal with the entire legal and equitable interest in the property. If, therefore, such

(*z*) Per Wigram, V.-C., in *West* v. *Reid*, 2 Ha. 249, 260. See *Mertins* v. *Jolliffe*, Amb. 311.

(*a*) *Cothay* v. *Sydenham*, 2 Bro. C. C. 391. See *Williams* v. *Williams*, 17 Ch. D. 437.

(*b*) *Earl of Portsmouth* v. *Lord Effingham*, 1 Ves. Sen. 435.

(*c*) *Jones* v. *Williams*, 24 Beav. 47. See *Jones* v. *Smith*, 1 Ha. 43.

(*d*) *Patman* v. *Harland*, 17 Ch. D. 353; *English and Scottish Mercantile Investment Trust* v. *Brunton*, (1892) 2 Q. B. 700, 713.

(*e*) *Jones* v. *Williams*, 24 Beav. 47; *Wilson* v. *Hart*, 2 H. & M. 551.

(*f*) *Re Alms Corn Charity*, (1901) 2 Ch. 750.

(*g*) See 3 & 4 Will. IV. c. 27, s. 30; and 37 & 38 Vict. c. 78, s. 1.

(*h*) 37 & 38 Vict. c. 78, s. 1. See Conv. Act, 1881, s. 3 (3).

instrument is a will and seisin is not proved (*i*), or, perhaps, if it is a voluntary settlement (*k*), production of the earlier title should be required.

Title to reversion.

So, also, inasmuch as no inference in favour of title to a reversion arises from lapse of time, its creation must be shown, however remote may be its origin (*l*).

Discovery of defect in earlier title.

A mortgagee will not be protected if any defect in the earlier title appears from the deeds abstracted (*m*); or if the mortgagor accidentally discloses such a defect (*n*). If, however, nothing appears on the face of deeds extending back over a sufficient period of time which throws a reasonable doubt or suspicion on the earlier title, the want of prior instruments, though recited or referred to in the abstracted deeds, is not material. "The true inquiry in every case is whether the absence of the recited deed throws any reasonable doubt upon the title" (*o*).

Title where legal estate outstanding.

If the agreement is for an equitable mortgage, it should be shown in whom the legal estate is vested, and what is the nature and amount of any prior incumbrances (*p*).

vi.—Constructive Notice from Known Facts.—A mortgagee or purchaser may be affected with constructive notice of not only such incumbrances, liabilities, or equities affecting the property of which he has or might have obtained information by examining the title deeds, but also of such as may be reasonably suspected to exist from the general circumstances of the case. Thus, if a mortgagee or purchaser has actual notice of any fact or circumstance by which the property is affected, constructive notice will be imputed to him of any rights, interests, or claims to which he would be led, if he made such inquiries as to such fact or circumstance as a prudent man of business might reasonably be expected to make (*q*). And a person cannot escape from the imputation of constructive

(*i*) *Parr* v. *Lovegrove*, 4 Drew. 170.

(*k*) See *Marsh* v. *Earl Granville*, 24 Ch. D. 11; *Noyes* v. *Patterson*, (1894) 3 Ch. 267. And see 56 & 57 Vict. c. 21, *ante*, p. 621.

(*l*) Dart (7th ed.), 329.

(*m*) *Sellick* v. *Trevor*, 11 M. & W. 722.

(*n*) *Smith* v. *Robinson*, 13 Ch. D. 148.

(*o*) *Parr* v. *Lovegrove*, 4 Drew. 170.

(*p*) See *Wynne* v. *Griffith*, 1 Russ. 283.

(*q*) *Allen* v. *Seckham*, 11 Ch. D. 790, 794; *Montefiore* v. *Browne*, 7 H. L. C. 241; *English and Scottish Mercantile Investment Trust* v. *Brunton*, (1892) 2 Q. B. 700, 710. See (1903) 2 Ch. at p. 39.

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notice by saying that he did not draw the natural inference from the facts which were within his knowledge (*r*).

Notice from state of property.

Thus, in several cases, the nature or state of the property has been such as to induce the Court to hold that a purchaser was put upon inquiry, and that he had constructive notice of easements or other rights affecting the property (*s*).

Notice from possession or occupation.

Upon the same principle, as a general rule, if a mortgagee or purchaser finds that the land is in the possession or occupation of a person other than the mortgagor or vendor, he will be deemed to have constructive notice of the rights and interests of the occupier; for possession being *primâ facie* evidence of a seisin in fee, the mortgagee or purchaser has actual notice of a fact by which the property is affected, and is bound to ascertain the truth (*t*). Thus, notice of the land being in the occupation of a person whom the mortgagee or purchaser supposes to be only a tenant from year to year will be constructive notice of the lease under which the occupier really holds (*u*), or of a collateral agreement between the landlord and tenant (*x*).

Possession of third person.

Where a mortgagee or purchaser has notice that the property is in the possession of a third person and his under-tenants, he is not justified in presuming the possession of that person to be the possession of the vendor, but must be deemed to have constructive notice of the title and rights of the person in possession and his under-tenants (*y*).

Notice of rights, &c. of tenant in possession.

A purchaser or mortgagee will be considered to have notice of a contract previously entered into by the tenant to become the purchaser of the freehold, although he had no intimation of the fact (*z*), and the Court will enforce specific performance against the vendor and the subsequent purchaser or mortgagee, and leave them to settle the question between themselves (*a*). But the purchaser from a vendee has not implied notice of the

(*r*) *Exp. Snowball*, L. R. 7 Ch. 540.

(*s*) *Hervey* v. *Smith*, 22 Beav. 299; *Moreland* v. *Richardson*, 24 Beav. 33; *Miles* v. *Tobin*, 16 W. R. 465; *Morland* v. *Cook*, L. R. 6 Eq. 252; *Davies* v. *Sear*, L. R. 7 Eq. 427. But see *Allen* v. *Seckham*, *sup.*; Sug. V. & P. 765.

(*t*) *Jones* v. *Smith*, 1 Ha. 43, 60; *Hunt* v. *Luck*, (1902) 1 Ch. 428, C. A.; *post*, p. 1345.

(*u*) *Taylor* v. *Stibbert*, 2 Ves. Jun. 437; *Daniels* v. *Davison*, 17 Ves. 433; *Allen* v. *Anthony*, 1 Mer. 282; *Brunton* v. *Neale*, 9 Jur. 338.

(*x*) *Green* v. *Rheinberg*, 104 L. T. 149, C. A.

(*y*) *Bailey* v. *Richardson*, 9 Ha. 734.

(*z*) *Daniels* v. *Davison*, 16 Ves. 249; *S. C.*, 17 Ves. 433; *Crofton* v. *Ormsby*, 2 Sch. & L. 583.

(*a*) *Daniels* v. *Davison*, *sup.*

vendor's lien for a part of the purchase-money, from the fact of the vendor being in possession as tenant, if such vendor has signed a receipt for the whole purchase-money (*b*), and the deed of conveyance to the vendee is not missing (*c*).

Nor does implied notice, arising from the occupation of the land by a third person, deprive the vendee of his right of compensation against the vendor (*d*).

Where possession is vacant.

Where the possession is vacant, a purchaser with notice of a late occupation of the land by a third person is not bound to inquire of him what was the nature of his title (*e*).

Possession of tenants in common.

Where several persons are in occupation of property as tenants in common and carrying on business thereon, a mortgagee or purchaser will have constructive notice of the title of the partnership (*f*).

What possession is sufficient.

If a person is of right in possession of a corporeal hereditament, it is not necessary that such possession should be continually visible or actively asserted in order to impute constructive notice to a mortgagee or purchaser (*g*).

Inquiries of tenants as to payment of rents, &c.

Where property is in the occupation of tenants, an intending mortgagee need not inquire of the tenants to whom they pay their rents, and if he does not inquire, or if he inquires, and is told that the rents are paid to an estate agent, and makes no further inquiry, he will not be affected with notice of the fact that the rents are paid to a person whose receipt is inconsistent with the ostensible title of the mortgagor. The fact of a tenancy only affects an intending mortgagee with notice of the rights of the tenants, not with notice of the title of the lessor (*h*).

But a mortgagee of a lease will be affected with notice of an agreement under which the tenant has paid a lump sum for future rents (*i*).

Other cases of constructive notice from possession.

The point of constructive notice from possession does not seem to have been taken in a case where a second mortgagee of copyholds under an actual surrender was preferred to a prior

(*b*) *White* v. *Wakefield*, 7 Sim. 401. See *Rimmer* v. *Webster*, (1902) 2 Ch. 163.

(*c*) *Worthington* v. *Morgan*, 16 Sim. 547.

(*d*) *Nelthorpe* v. *Holgate*, 1 Coll. 203.

(*e*) *Miles* v. *Langley*, 1 R. & My. 39.

(*f*) *Cavander* v. *Bulteel*, L. R. 9 Ch. 79.

(*g*) *Holmes* v. *Powell*, 8 De G. M. & G. 572. But see L. R. 9 Ch. at p. 82.

(*h*) *Hunt* v. *Luck*, (1902) 1 Ch. 428, C. A. See *Knight* v. *Bowyer*, 2 D. & J. 421; and see *ante*, p. 1338.

(*i*) *Green* v. *Rheinberg*, 104 L. T. 149.

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mortgagee with a covenant to surrender, although the prior mortgagee was in possession, and the mortgagor had been out of possession, for thirteen years (*k*). And it is said that a purchaser who dealt with a person out of possession, and did not use the means which a person of due diligence would be expected to use to ascertain the title, would be fixed with implied notice (*l*).

Notice from official or fiduciary position of mortgagor.

Where the person depositing documents of title as security for a debt or loan holds an official or fiduciary position, the circumstances may be such as to affect the depositee with constructive notice that the money belongs not to the depositor but to his employers (*m*).

Deposit of share certificate by trustee.

Where shares stand in the name of a trustee, who deposits the certificates thereof with a person advancing money to the trustee without inquiry by the depositee as to his real position, the depositee is postponed to the prior equity (*n*).

Renewal of lease by trustee.

So where a trustee takes a renewed lease in his own name, and deposits it as security for his own debt, the *cestuis que trust* are preferred (*o*).

This class of cases seems to depend rather on the general principle that, where conflicting equities are equal, the equity which is prior in point of time must prevail, than on the doctrine of constructive notice.

Court rolls of manors.

It appears to be now settled that a purchaser of copyholds is not bound to search the rolls of the manor of which they are held, and the rolls are in consequence not of themselves notice of their contents (*p*).

But it seems that persons who deal with copyhold tenants ought to inform themselves as to the existence of any customs of the manor which may affect their interests; so that a subsequent incumbrancer of copyholds who had searched the rolls was nevertheless bound by a prior incumbrance not entered

(*k*) *Oxwick* v. *Plumer*, 2 Vern. 636; Bac. Abr. Mortgages, E. s. 3. See the observations on this case in *Barnhart* v. *Greenshields*, 9 Moo. P. C. 18.

(*l*) *Popple* v. *Prideaux*, cit. arg. 3 My. & K. 707.

(*m*) *Mayor, &c. of Berwick-upon-Tweed* v. *Murray*, 7 De G. M. & G. 497.

(*n*) *Shropshire Union, &c. Co.* v. *Reg.*, L. R. 7 H. L. 496. See *Bourke* v. *Lee*, (1904) 1 Ir. R. 280.

(*o*) *Re Morgan, Pillgrem* v. *Pillgrem*, 18 Ch. D. 93, C. A. See *Powell* v. *London and Prov. Bank*, (1893) 2 Ch. 555, C. A.

(*p*) *Bugden* v. *Bignold*, 2 Y. & C. C. C. 377.

thereon (*q*), there being, by the custom of the manor, no time limited for presenting surrenders made out of Court.

A person who takes an equitable mortgage on copyholds from an heir-at-law ought not to be satisfied by the deposit of a copy of his admission only, but should inquire for the admission of his ancestor also (*r*).

So a mortgagee who contents himself by examining the court rolls, where he would only find notice of legal incumbrances, shall not be excused (*s*) for neglecting to inquire for the copies of the court roll.

Notice to produce deposited deeds.

In an Irish case (*t*), an equitable mortgagee by deposit of deeds was held to be affected with notice of a subsequent incumbrance, by reason of notice to lodge the deeds having been served on him on a petition for sale presented by the subsequent incumbrancer, so as to entitle the latter to priority over all further advances made by the prior mortgagee after service of the notice.

Lis pendens how far notice.

A purchaser *pendente lite*, although for a valuable consideration and without notice, was, prior to 2 & 3 Vict. c. 11, bound by the decree (*u*), if there had been a close and continued prosecution of the suit (*x*). But since that statute (*y*), *lis pendens* does not affect a purchaser or mortgagee without express notice, until a memorandum containing the particulars mentioned in the Act is left to be registered at the office of the Land Registry (*z*); which memorandum is to be re-registered every five years, in like manner as judgments are required to be by 1 & 2 Vict. c. 110. The provision was extended to common law and equity courts of Counties Palatine (*a*). *Lis pendens* is of itself binding, if duly registered, and, whether registered or not, affects a mortgagee or purchaser by express notice of it (*b*).

A person who, without notice of a suit, purchases from one of the defendants property which is the subject of it, is not, in consequence of the pendency of the suit, affected by an

(*q*) *Horlock* v. *Priestley*, 2 Sim. 75. See *Hanbury* v. *Lichfield*, 2 My. & K. 629.
(*r*) *Tylee* v. *Webb*, 6 Beav. 552.
(*s*) *Whitbread* v. *Jordan*, 1 Y. & C. Ex. 303.
(*t*) *Re Keogh's Estate*, (1895) 1 Ir. R. 201.
(*u*) *Ante*, p. 654.
(*x*) *Kinsman* v. *Kinsman*, 1 R. & My. 622.
(*y*) Sect. 7.
(*z*) 63 & 64 Vict. c. 26, and order of 3rd Aug. 1900.
(*a*) 13 & 14 Vict. c. 43.
(*b*) 18 & 19 Vict. c. 15, s. 3. See in Ireland, 7 & 8 Vict. c. 90, s. 10; 11 & 12 Vict. c. 120, s. 12; 13 & 14 Vict. c. 29, s. 5.

equitable title of another defendant, which appears on the face of the proceedings, but of which he has no notice and to which it is not necessary for any of the purposes of the suit to give effect (*c*).

Co-defendants.

But interests of defendants *inter se*, arising out of the rights of the plaintiff, are protected by the doctrine of *lis pendens* (*d*).

Nature of suit.

Even under the former law a specific claim to the particular subject must have been made by the *lis pendens*, and it must not have been merely a suit to carry into effect the general trusts of a creditor's deed (*e*); nor a mere general administration suit (*f*); nor a suit which cannot properly be brought to a hearing (*g*); nor to a suit relating to money secured on an estate, but not to the estate itself (*h*). It extends to any interest directly in question in the suit; as to an assignment of the equity of redemption to a purchaser from a devisee, pending a suit by the heir to invalidate the will (*i*); and to a contract made before, but completed after, the commencement of the suit (*k*).

Lis pendens applies only to land.

The doctrine of *lis pendens* does not apply to personal property other than chattel interests in land (*l*).

Lis pendens creates no charge.

A registered *lis pendens* does not create a charge or lien on the property, nor does it excuse a purchaser from completing his contract. It merely puts him upon an inquiry into the validity of the plaintiff's claim (*m*). It does not prevent executors or trustees carrying out the general trusts of the will, or invalidate the title of purchasers from them (*n*); but in the case of a particular estate with a particular trust it is otherwise (*o*); and it does affect a mortgagee of the executor *pendente lite* in a suit by a judgment creditor, where the life estate of the executor in lands, subject to the judgment, was liable to recoup assets of the testator which by the exe-

(*c*) *Bellamy* v. *Sabine*, 1 De G. & J. 566.

(*d*) *Tyler* v. *Thomas*, 25 Beav. 47. And see Ord. XVII.

(*e*) *Holt* v. *Dewell*, 4 Ha. 446.

(*f*) *Reed* v. *Freer*, 13 L. J. Ch. 417; *Warburton* v. *Edge*, 9 Sim. 508; *Houlditch* v. *Wallace*, 5 Cl. & F. 629.

(*g*) Barn. Ch. R. 454.

(*h*) *Worsley* v. *Earl of Scarborough*, 3 Atk. 392.

(*i*) *Garth* v. *Ward*, 2 Atk. 175.

(*k*) *Norris* v. *Lord Dudley Stuart*, 16 Beav. 359.

(*l*) *Wigram* v. *Buckley*, (1894) 3 Ch. 383, C. A.

(*m*) *Bull* v. *Hutchens*, 32 Beav. 615.

(*n*) *Berry* v. *Gibbons*, L. R. 8 Ch. 747. See *Jennings* v. *Bond*, 2 J. & L. 720; *Drew* v. *Earl of Norbury*, 3 J. & L. 267.

(*o*) *Walker* v. *Flamstead*, 2 Kenyon, pt. 2, 57, Ch.

cutor's default had become applicable to discharge the judgment (*p*).

From what time *lis pendens* takes effect.

Lis pendens formerly took effect when the bill was filed by relation from the service of the subpœna (*q*). It is considered that it will now take effect from the service of the writ when the action has been registered under the statute (*r*).

Appeal.

An order for an appeal seems not to be a continuation of the *lis pendens* (*s*).

Vacation of *lis pendens*.

As a registered *lis pendens* could not be vacated without the consent of the person by whom it was registered, which consent was sometimes withheld, it has been enacted by 30 & 31 Vict. c. 47, s. 2, that the Court before which the property sought to be bound is in litigation may, upon the determination, or during the pendency of the litigation, when it shall be satisfied that the litigation is not prosecuted *bonâ fide*, order the registration to be vacated without the consent of the party who registered it, and may, in the discretion of the Court, direct the party on whose behalf the registration was made to pay all the costs and expenses occasioned by the registration or the vacating thereof (*t*).

Judgments and orders.

Judgments and decrees are not notice of themselves, although registered, yet unless they be registered and re-registered, a purchaser is not affected even by express notice of them (*u*).

A writ or order affecting land is void against a purchaser or mortgagee unless it is registered (*x*).

Notice of suit is notice of solicitor's lien.

A person taking with notice of any suit, matter, or other proceeding, from a party thereto, a mortgage or other assignment of property, including real estate, which is the subject-matter of such suit, &c., is affected with constructive notice of the lien, under the Solicitors Act, 1860 (*y*), of any solicitor employed in the suit, entitling him to an order charging property recovered or preserved in that suit; and the solicitor need

(*p*) *Jennings* v. *Bond*, *sup.* See *Drew* v. *Earl of Norbury*, *sup.*

(*q*) *Anon.*, 1 Vern. 318.

(*r*) *Schofield* v. *Solomon*, 52 L. T. 679.

(*s*) Sug. V. & P. (14th ed.) p. 758. See *Waldo* v. *Caley*, 16 Ves. 206, at p. 213; notwithstanding *Gore* v. *Stackpoole*, 1 Dow, P. C. 18, 31.

(*t*) Sect. 2 of the Act; *Baxter* v. *Middleton*, (1898) 1 Ch. 313, aff. 42 Sol. J. 508. See *Pooley* v. *Bosanquet*, 7 Ch. D. 541.

(*u*) 3 & 4 Vict. c. 82, s. 2; 18 & 19 Vict. c. 15, s. 5.

(*x*) 51 & 52 Vict. c. 51, s. 6.

(*y*) 23 & 24 Vict. c. 127, s. 28.

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not, therefore, give notice to an intending assignee so as to ensure priority for his lien (*z*).

Act of bankruptcy.

An act of bankruptcy will not of itself amount to notice, and the question as to what does or does not amount to notice has given rise to numerous decisions the effect of which will be here briefly noticed.

If an act of bankruptcy has been, in fact, committed, any information which, having regard to the source from which it is derived, or other circumstances, ought to induce a reasonable man to believe it to be true, so as to put him on inquiry, will be sufficient notice (*a*). And knowledge of facts which are in themselves sufficient to lead a person to the conclusion that an act of bankruptcy has been committed will be sufficient notice (*b*), even though that person states that he did not, in fact, draw such inference (*c*), or that he did not know that the fact of which he had knowledge amounted to an act of bankruptcy (*d*); but notice of facts which may or may not amount in law to an act of bankruptcy is apparently not sufficient (*e*). A person will also be fixed with notice if he has knowledge that an act of bankruptcy has been committed though he may have no specific knowledge of the particular act (*f*). Notice that a petition has been filed is usually sufficient (*g*); but, *semble,* notice that a petition has been dismissed is not (*h*). It is immaterial from whence the knowledge was derived (*i*).

Notice of an intention to commit an act of bankruptcy is not generally sufficient (*k*); but a debtor commits an act of bankruptcy if he gives notice to any of his creditors that he is about to suspend payment of his debts (*l*).

vii.—Notice through Solicitor or other Agent.—The Con-

(*z*) *Faithfull* v. *Ewen*, 7 Ch. D. 495, C. A. See *Birnam Wood*, (1907) P. 1.

(*a*) *Hope* v. *Meek*, 10 Exch. 829. See *Bird* v. *Bass*, 6 Man. & Gr. 143; *Brewin* v. *Short*, 24 L. J. Q. B. 297.

(*b*) *Smith* v. *Osborn*, 1 F. & F. 267.

(*c*) *Exp. Snowball, Re Douglas*, L. R. 7 Ch. 534.

(*d*) *Lackington* v. *Elliott*, 8 Sc. N. R. 275.

(*e*) *Evans* v. *Hallam*, L. R. 6 Q. B. 713. See *Lucas* v. *Dicker*, 6 Q. B. D. 84.

(*f*) *Hocking* v. *Acraman*, 12 M. & W. 170; *Udal* v. *Walton*, 14 M. & W. 254.

(*g*) *Lucas* v. *Dicker*, *sup.*

(*h*) *Ibid.*

(*i*) *Courage* v. *O'Shea*, (1895) 1 Ch. 325.

(*k*) *Exp. Hallifax*, 2 M. D. & De G. 544; *Exp. Arnold, Re Wright*, 3 Ch. D. 70.

(*l*) 46 & 47 Vict. c. 52, s. 4, sub-s. 1 (h).

veyancing Act, 1882 (*m*), s. 3, affects a mortgagee or purchaser with notice of matters not only which are, or ought to be, within his own knowledge, but also, under certain circumstances, which are or ought to have come to the knowledge of his counsel, solicitor, or other agent.

Actual notice to solicitor.

It has long been settled that actual notice to the counsel, solicitor, or agent of a party in relation to the matter in which he is employed is constructive or imputed notice to his principal (*n*).

So where moneys placed by a client in the hands of his solicitor for investment were advanced on the security of a mortgage, which the solicitor took in his own name as principal, it was held that the client was affected by notice of all matters which came to the solicitor's knowledge (*o*).

Same solicitor acting for both parties.

The rule applies where the same solicitor acts for both the mortgagor and the mortgagee (*p*); and, apparently, it would apply in such a case, even where the transaction is carried out under an order of the Court (*q*).

Where mortgagor is mortgagee's solicitor.

The application of the rule will not be excluded even though the solicitor acting for the mortgagee throughout the transaction is himself the mortgagor (*r*). If the mortgagee is imprudent enough to entrust his interests to the mortgagor, being a solicitor, he may do so, but must take all the consequences; but the mortgagee may consider himself competent to protect his own interests; and the mere fact that the mortgagor, being a solicitor, prepares the mortgage deed, the mortgagee employing no other solicitor, is not sufficient to constitute the mortgagor the solicitor of the mortgagee so as to affect the latter with notice of an incumbrance known to the former (*s*).

What will constitute a solicitor the mortgagee's agent so as to affect mortgagee with notice.

So, generally, the fact that only one solicitor is employed in a transaction does not of itself constitute him the solicitor of both parties so as to affect each with matters known to the other (*t*). And the actual employment by a party of a person

(*m*) 45 & 46 Vict. c. 39.

(*n*) *Le Neve* v. *Le Neve*, 3 Atk. 646. See also notes thereon in 2 Wh. & Tu. L. C.

(*o*) *Spaight* v. *Cowne*, 1 H. & M. 359.

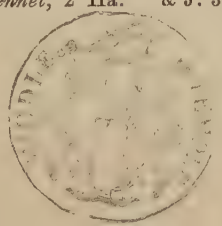
(*p*) *Tweedale* v. *Tweedale*, 23 Beav. 341. See *Sheldon* v. *Cox*, 2 Ed. 228; *Fuller* v. *Bennet*, 2 Ha. 402.

(*q*) *Toulmin* v. *Steere*, 3 Mer. 210.

(*r*) *Dryden* v. *Frost*, 3 My. & Cr. 670. See *Robinson* v. *Briggs*, 1 Sm. & G. 188; *Spencer* v. *Topham*, 2 Jur. N. S. 865.

(*s*) *Espin* v. *Pemberton*, 3 De G. & J. 547.

(*t*) *Perry* v. *Holl*, 2 De G. F. & J. 38.



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as solicitor or agent to do some merely ministerial act connected with the transaction does not constitute that person the solicitor or agent in the transaction of the party so employing him so as to affect the latter with matters within the knowledge of the former (*u*).

It does not, however, necessarily follow that, because a counsel, solicitor, or other agent is employed in part only of the transaction, his knowledge of matters relating to the transaction will not affect the party employing him with notice (*x*).

Constructive notice to solicitor.

Constructive notice to the solicitor is notice to the client (*y*), as where the solicitor of a lady upon her marriage has notice that the title deeds of the settled estates are at the bankers of the settlor, and makes no inquiry (*z*).

Notice to town agent.

Notice to the town agent of the country solicitor of the purchaser or mortgagee is notice to the principal (*a*).

Notice to solicitor's clerk.

Notice to the clerk of a solicitor who has the conduct of the cause or business, but not otherwise, is notice to the client (*b*).

Application of rule to agents generally.

The rule applies in all cases where the parties stand to each other in the relation of principal and agent. So, where a father, having notice of a prior agreement, procured a lease to be made to his son, the son was held to be fixed with notice of the agreement (*c*).

Notice must be in same transaction.

It was laid down in an early case (*d*), that notice to a counsel, solicitor, or other agent must, in order to affect the client or principal, have been given in the same transaction. At one time there appears to have been a tendency to depart from this rule and to impute notice through counsel, &c., where separate transactions were consecutive, immediately or after a short interval, or where they were so closely connected with each other that it might be presumed that the prior transaction must have been present to the mind of the counsel, &c., when employed in the later transaction (*e*). But constructive notice to the client or principal is prevented under such circumstances

(*u*) *Wyllie* v. *Pollen*, 3 De G. J. & S. 596. See *Kettlewell* v. *Watson*, 26 Ch. D. 501, at p. 508, C. A.

(*x*) *Bury* v. *Bury*, cit. Sug. V. & P. (14th ed.) p. 756.

(*y*) Sug. V. & P. 756.

(*z*) *Maxfield* v. *Burton*, L. R. 17 Eq. 15.

(*a*) *Norris* v. *Le Neve*, 3 Atk. 26; *Brewin* v. *Briscoe*, 7 W. R. 584.

(*b*) *Pike* v. *Stephens*, 12 Q. B. 465; *Re Ashton, Exp. McGowan*, 64 L. T. 28.

(*c*) *Coote* v. *Mammon*, 5 Bro. P. C. 355 (Toml. Ed.).

(*d*) *Warwick* v. *Warwick*, 3 Atk. 294.

(*e*) *Hargreaves* v. *Rothwell*, 1 Keen, 159. See *Mountford* v. *Scott*, *sup.*; *Winter* v. *Lord Anson*, 3 Russ. 493; *Fuller* v. *Bennet*, 2 Ha. 394.

by the express terms of the Conveyancing Act, 1882, which enacts that he shall not be affected by notice unless the notice is given or imparted "in the same transaction with respect to which a question of notice arises" (*f*).

Notice must be material to transaction.

Moreover, knowledge of counsel, &c., in order to affect the client or principal with notice, must be material to the particular transaction in which the question arises, and such as ought to have been communicated to the client or principal (*g*).

Notice to solicitor not communicated to client.

Notice to a solicitor or other agent authorized to receive notice (*h*), about a matter as to which it is part of his duty to inform himself, is notice to the client or principal, although not communicated to him by the solicitor or agent. "The purchaser of an estate can never be allowed to say that he knew nothing of some prior incumbrance because he was not told of it by his solicitor. It cannot be left to the possibility or the impossibility of the man who seeks to affect you with notice being able to prove that your solicitor did his duty in communicating to you that which, according to the terms of your employment of him, was the very thing which you employed him to ascertain" (*i*).

Omission to require strict evidence of title.

The omission of a solicitor to require strict legal evidence of title before advancing his client's money is not necessarily such negligence as will fix the client with constructive notice (*k*).

Exception to rule where solicitor is himself guilty of fraud.

An important exception to the general rule above stated arises where a solicitor or agent has himself practised a fraud with respect to the title, in which case the client or principal will not generally be affected with notice of the fraud (*l*). This exception may be regarded as based upon two somewhat different considerations: first, that inasmuch as a solicitor or agent cannot be taken to have communicated his own fraud, the exception arises where the conduct of the solicitor or agent is such as to raise a conclusive presumption that he would not communicate the fact in question (*m*); and, secondly, that

(*f*) 45 & 46 Vict. c. 39, s. 3, set out *ante*, p. 1332. See *Re Cousins*, 31 Ch. D. 671, 676; *Taylor* v. *London and County Banking Co.*, (1901) 2 Ch. 231, C. A.

(*g*) *Wyllie* v. *Pollen*, 3 De G. J. & S. 596.

(*h*) See *Saffron Walden Second Benefit Building Soc.* v. *Rayner*, 14 Ch. D. 406, 410, C. A.

(*i*) *Rolland* v. *Hart*, L. R. 6 Ch. 678, 682.

(*k*) *Perry* v. *Holl*, 2 De G. F. & J. 38.

(*l*) *Kennedy* v. *Green*, 3 My. & K. 699; *Waldy* v. *Gray*, L. R. 20 Eq. 251. See *Davis* v. *Hutchings*, (1907) 1 Ch. 356, *inf.*

(*m*) *Kennedy* v. *Green*, *sup.*; *Thompson* v. *Cartwright*, 33 Beav.

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where the Court is satisfied that the solicitor or agent has designed a fraud which required a suppression from the client or principal of the knowledge to be imputed, the act done by the solicitor or other agent cannot be said to have been done by him in his character as such, but in the character of a party to an independent fraud, so that the fraud is not to be imputed to the principal as an act done by his agent (*n*).

Conditions of exception.

But, in order to bring a case within the exception, two conditions appear to be necessary.

Fraud must be independent of whether the act done was made known or not.

First, it must be made out that distinct fraud was intended in the very transaction, so as to make it necessary for the solicitor to conceal the facts from his client in order to defraud him. So, where a solicitor took a mortgage of an equity of redemption and sub-mortgaged it, he subsequently joined with the first mortgagee and the mortgagor in a new mortgage, and, acting as solicitor for all parties, he concealed the sub-mortgage from the new mortgagee: it was held that the new mortgagee was affected by the solicitor's knowledge of the sub-mortgage, and took subject to it. Sir G. Turner, L. J., considered that this case did not fall within the exception, which, in his view, applied only to cases where there is fraud, independently of the question whether the act which had been done was made known or not; but, in such cases as that then before his lordship, the question of fraud wholly depends upon whether the act which has been done has been made known or not (*o*).

Fraud must have been effectually concealed.

Secondly, the fraud must be so effectually concealed that the client himself, or an independent solicitor, if employed by him, would not have had his attention called to the suspicious circumstances attending the transaction, and have been put on inquiry. So where the fraud was apparent on the face of the deed fraudulently obtained, it was held that, though the mortgagee would not otherwise have been fixed with notice of the fraud, yet that the suspicious circumstances under which the fraud was committed were such as would have put an independent solicitor, if employed by the mortgagee, on inquiry, and, accordingly, fixed the mortgagee with notice of the fraud

178. See *Re European Bank, Exp. Oriental Commercial Bank*, L. R. 5 Ch. 358.

(*n*) *Cave* v. *Cave*, 15 Ch. D. 639, 644. See *Espin* v. *Pemberton*, 3 De G. & J. 547; *Rolland* v. *Hart*, L. R. 6 Ch. 678.

(*o*) *Atterbury* v. *Wallis*, 8 De G. M. & G. 454. See *Rolland* v. *Hart*, L. R. 6 Ch. 678, at p. 683; *Cave* v. *Cave*, 15 Ch. D. 639; *Dixon* v. *Winch*, *inf.*

as if he had employed such solicitor (*p*). A client who fails in his duty to make proper inquiries cannot shelter himself behind the fraud of his solicitor (*q*).

So there may be such a general agency of the solicitor for the client that the knowledge of the solicitor must be imputed to the client; and where a client places himself entirely in the hands of his solicitor, he cannot be allowed to set up his actual ignorance of matters which were within the knowledge of his solicitor (*r*).

Extent of the exception.

Moreover, the exception will not extend so as to prevent a client from being affected, through his solicitor, with notice of matters relating to the transaction, other than the fraud itself, but which the fraud was intended to conceal. Thus, where a solicitor-trustee sold trust property, forging the signatures of his co-trustees to the conveyance, to a purchaser for whom he acted as solicitor in the matter, it was held that the purchaser had, through the solicitor, constructive notice of the trust. Sir R. T. Kindersley, V.-C., said: "But if the client would be affected with constructive notice of a trust, the existence of which is known to his solicitor in the case where there is no fraud, the fact that the solicitor is committing a fraud in relation to that trust cannot afford any reason why the client should not be affected with constructive notice of the existence of the trust. It is the existence of the trust, and not the fraud, of which he is held to have constructive notice; and the constructive notice of the existence of the trust must be imputed to him, whether there is a fraud relating to it or not" (*s*).

Exception in case of collusion of solicitor with one of the parties for whom he acts.

A further exception to the rule that a client or principal is affected by notice through his solicitor or other agent arises where there is evidence of conspiracy or collusion between a solicitor or other agent, who acts for both parties, and one of the parties to the prejudice of the other. So, where on a mortgage by a husband and wife of the wife's real estate to secure an advance to the husband, they falsely informed the mortgagee that there was no settlement, and their solicitor, who also acted for the mortgagee in the matter, being aware of the

(*p*) *Kennedy* v. *Green*, 3 My. & K. 699; *Berwick* v. *Price*, *inf.* See *Taylor* v. *London and County Banking Co.*, (1901) 2 Ch. 231, C. A.

(*q*) *Davis* v. *Hutchings*, (1907) 1 Ch. 356.

(*r*) *Dixon* v. *Winch*, (1900) 1 Ch. 736, C. A. Cf. *Berwick* v. *Price*, (1905) 1 Ch. 632.

(*s*) *Boursot* v. *Savage*, L. R. 2 Eq. 134, 142.

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existence of a settlement, concealed it from the mortgagee with the privity and acquiescence of the mortgagors, it was held that the mortgagee was not affected with notice of the settlement (*t*).

Liability of solicitor in respect of constructive notice.

It may be here remarked that, though a solicitor may be fixed with constructive notice, so as, through him, to affect his client, such notice will not necessarily be deemed to render the solicitor constructively a trustee, so as to be liable personally to make good losses occasioned by his omission to make further inquiries (*u*).

Misapplication of funds by directors.

The mere fact that a loan by one joint stock company to another is negotiated by persons who are directors or officers of both companies, and that the mortgage is prepared by a solicitor who acts for both companies, is not sufficient to affect the mortgagee company with notice of any illegality in the purpose to which the loan is to be applied (*x*).

Director.

Notice to a director of a lending company in his private capacity of the purposes to which the borrowing company intends to apply the money borrowed will not be imputed to the lending company so as to invalidate debentures (*y*).

No notice of motives, &c.

Imputed knowledge does not extend to matters relating to motives and objects (*z*).

Section III.

Loss of Priority by Failure to obtain or retain Title Deeds.

Importance to first mortgagee of delivery of title deeds.

i.—Notice from Absence of Title Deeds.—It has been seen that, as a general rule, a mortgagee is entitled to expect from a mortgagor conveying any property or interest therein, delivery of all deeds and documents of title relating to such property or interest, of which the mortgagor himself has the right of custody (*a*).

(*t*) *Sharpe* v. *Foy*, L. R. 4 Ch. 35. See *Keate* v. *Phillips*, 18 Ch. D. 560.

(*u*) *Williams* v. *Williams*, 17 Ch. D. 437.

(*x*) *Re Marseilles Extension Rail. Co.*, L. R. 7 Ch. 161; *Re Hampshire Land Co., Exp. Portsea Island Building Soc.*, (1896) 2 Ch. 743.

(*y*) *Re Payne & Co.*, (1904) 2 Ch. 608.

(*z*) *Eyre* v. *Burmester*, 10 H. L. C. 90.

(*a*) *Ante*, p. 834.

Effect of absence of deeds, in postponing prior incumbrance.

It is obvious that if the mortgagor, instead of delivering the title deeds to the first mortgagee, is allowed to retain them in his own possession, he will be thereby enabled, by suppressing the prior mortgage, to deal with the property as if he were the owner of it free from incumbrances; and, accordingly, in order to prevent a subsequent incumbrancer or purchaser who has no notice of the mortgage, from being defrauded, a prior mortgagee, who has allowed the mortgagor to retain or regain possession of the title deeds, has been postponed to a subsequent incumbrancer or purchaser for value without notice, who has obtained from the mortgagor delivery of the deeds.

Whether priority of second mortgagee enures for benefit of subsequent incumbrancers.

Where priority is gained by a second incumbrancer over the first by obtaining possession of the title deeds, such priority does not enure to a third incumbrancer as a matter of course; it does where the third incumbrancer has ascertained that the deeds are in the possession of the second incumbrancer apparently as first mortgagee (*b*).

As the delivery of the title deeds gives an assurance of the character of first incumbrancer, and generally speaking, that the legal estate is acquired by the conveyance, so the non-delivery of the title deeds, until otherwise explained, is an intimation that there may be a prior incumbrancer to whom they have been delivered (*c*).

Effect of notice that deeds are in possession of a third party.

Notice that the title deeds are in the possession of a third person will generally be sufficient to set a purchaser or mortgagee upon inquiry, to ascertain whether the party holding the deeds has a charge or claim on the estate, and may be held, under the circumstances, to be notice of the nature and amount of such charge or claim (*d*).

If a mortgagee does not ask for the deeds he will be affected with notice of the rights of undisclosed mortgagees in whose custody they are (*e*).

An equitable mortgagee by deposit of title deeds will have preference over a subsequent purchaser or mortgagee of the legal estate, with notice of the charge by deposit (*f*). And

(*b*) *Clarke* v. *Palmer*, 21 Ch. D. 124. See further on this point, *infra*, pp. 1362 *et seq.*

(*c*) Dav. Conv. vol. ii. pt. 2, pp. 239, 240.

(*d*) *Birch* v. *Ellames*, 2 Anst. 427; *Hiern* v. *Mill*, 13 Ves. 114; *Dryden* v. *Frost*, 3 My. & Cr. 670; *Maxfield* v. *Burton*, L. R. 17 Eq. 15.

(*e*) *Berwick* v. *Price*, (1905) 1 Ch. at p. 638; *Re Weniger's Policy*, (1910) 2 Ch. 291.

(*f*) *Jones* v. *Williams*, 24 Beav. 47; *Leigh* v. *Lloyd*, 35 Beav. 455.

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notice will be implied from the nature of the transaction, as if the subsequent purchaser or mortgagee was informed that the creditor was in possession of the title deeds, and neglected to make inquiry for what purpose he held them, which is *crassa negligentia* (*g*).

Possession of mortgagor's solicitor.

But notice that the deeds are in the possession of the solicitor of the depositor is not notice of an equitable mortgage of such solicitor, because it is in the usual course of affairs that the solicitor should hold his client's deeds (*h*).

Mere absence of deeds not notice.

It has been repeatedly held that the mere absence of the title deeds will not *per se* postpone a legal mortgagee to a subsequent incumbrancer who obtains possession of the deeds by fraud of the mortgagor, nor affect such a mortgagee with notice of the lien of a prior incumbrancer in whose possession the deeds are, if the mortgagee, having the protection of the legal estate, has made and prosecuted with due diligence inquiries as to the deeds, and has been given a reasonable excuse for their non-production. In such a case, there is no sufficient proof of fraud or gross negligence on his part as to affect him with constructive notice (*i*). Thus a legal mortgagee, though without the title deeds, was not fixed with notice, where he had inquired and was assured by the mortgagor that all the title deeds had been delivered to him (*k*); so where the mortgagor promised to deliver the deeds, but at the time of the execution of the mortgage made some excuse for not doing so, as that they were in the country (*l*); and generally where the mortgagee is misled by false information (*m*).

But the false information will be no excuse, if the truth can be arrived at by inquiry from other persons; as where a *puisne* mortgagee was informed that the prior incumbrancer only had a judgment or warrant of attorney when he really had

(*g*) *Hiern* v. *Mill*, 13 Ves. 114; *Oliver* v. *Hinton*, (1899) 2 Ch. 264, C. A.

(*h*) *Bozon* v. *Williams*, 3 Y. & J. 150. And see *Lloyd* v. *Attwood*, 3 De G. & J. 614, 651. But see *Richards* v. *Plattel*, Cr. & Ph. 79.

(*i*) *Plumb* v. *Fluitt*, 2 Anst. 432; *Hewitt* v. *Loosemore*, 9 Ha. 449, 458; *Colyer* v. *Finch*, 5 H. L. C. 905; *Roberts* v. *Croft*, 2 De G. & J. 1; *Perry-Herrick* v. *Attwood*, 2 De G. & J. 37; *Atterbury* v. *Wallis*, 8 De G. M. & G. 454; *Hipkins* v. *Amery*, 2 Giff. 292; *Ratcliffe* v. *Barnard*, L. R. 6 Ch. 652.

(*k*) *Hunt* v. *Elmes*, 2 De G. F. & J. 578; *Dixon* v. *Muckleston*, L. R. 8 Ch. 155.

(*l*) *Head* v. *Egerton*, 3 P. Wms. 280; *Plumb* v. *Fluitt*, *sup.*; *Hewitt* v. *Loosemore*, 2 Anst. 432; *Espin* v. *Pemberton*, 3 De G. & J. 547; *Agra Bank* v. *Barry*, L. R. 7 H. L. 135.

(*m*) *Jones* v. *Smith*, 1 Ha. 43; *Jones* v. *Williams*, 24 Beav. 47; but see *Oliver* v. *Hinton*, (1899) 2 Ch. 264, C. A.

a mortgage (*n*), or, where the mortgage being of a reversion, the mortgagor asserted that the deeds were in the hands of a tenant for life (*o*), or stated that the deeds related to other property (*p*).

Fraud not essential.

Fraud, however, is not, according to the most recent authorities, essential to deprive a purchaser of the benefit of the legal estate. A purchaser making no inquiry or making inquiry and failing to take reasonable means to verify the truth of the excuse for not producing the deeds is, although perfectly honest, guilty of such negligence as to make it inequitable for him to rely on his legal estate to deprive a prior incumbrancer of his priority (*q*). This principle is equally applicable to a subsequent equitable mortgage which has only been rendered possible by the omission to make inquiry (*r*).

Omission to make any inquiry as to deeds.

The rule is well settled that if a mortgagee makes no inquiry after the title deeds, that is such gross negligence as will postpone him to the lien of a person in whose possession they are (*s*).

So where the trustee of a marriage settlement, whereby certain leasehold houses had been assigned to him, made no inquiries as to the title deeds which had been previously deposited by the settlor with his bankers as security for a loan, it was held that the omission to inquire prevented the trustee from availing himself of his legal estate, so as to obtain priority over any advances made by the bank previously to their receipt of notice of the settlement (*t*), and the *cestuis que trust* are in no better position than the trustee (*u*).

A purchaser who without requiring production of the title deeds takes a title from a mortgagee who has deposited them by way of sub-mortgage is affected with constructive notice of the sub-mortgage (*x*).

(*n*) *Ladbroke* v. *Lee*, 4 De G. & S. 106; *Taylor* v. *Baker*, 5 Pri. 306; *Heathorne* v. *Darling*, 1 Moo. P. C. 5; *Broadbent* v. *Barlow*, 3 De G. F. & J. 570. See *Jared* v. *Clements*, (1903) 1 Ch. 428, C. A.

(*o*) See *Tourle* v. *Rand*, 2 Bro. C. C. 650.

(*p*) *Oliver* v. *Hinton*, *sup.*

(*q*) *Oliver* v. *Hinton*, (1899) 2 Ch. 264; *Berwick* v. *Price*, (1905) 1 Ch. 632; *Walker* v. *Linom*, (1907) 2 Ch. 104.

(*r*) *Walker* v. *Linom*, *sup.*, per Parker, J.

(*s*) *Worthington* v. *Morgan*, 16 Sim. 547; *Stein* v. *Stein*, 16 W. R. 69 (Ir.). See *Ogilvie* v. *Jeaffreson*, 2 Giff. 353; *Spencer* v. *Clarke*, 9 Ch. D. 137; *Oliver* v. *Hinton*, (1899) 2 Ch. 264, C. A.

(*t*) *Lloyd's Banking Co.* v. *Jones*, 29 Ch. D. 221.

(*u*) *Walker* v. *Linom*, (1907) 2 Ch. 104.

(*x*) *Berwick* v. *Price*, (1905) 1 Ch. 632.

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A purchaser of leaseholds, having paid part of the purchase-money without calling for the deeds, was fixed with notice of a concealed deposit thereof, but not of a deposit of a spurious lease (*y*).

Incomplete inquiry.

A mortgagee is not to be postponed because he has not made all the inquiries after the deeds which could or might have been made (*z*).

If a mortgagee makes inquiry and receives incomplete information, he is bound to prosecute his inquiry until he is satisfactorily and completely informed as to the state of the title; where a party relies on his ignorance of facts, he must show not only that he had not the information, but that he could not with reasonable diligence obtain it (*a*).

Where a legal mortgage was taken without obtaining the title deeds upon a representation that they were held on behalf of a prior equitable incumbrancer, and the mortgagee made no further inquiries as to the deeds, he was postponed to a subsequent incumbrancer, who had no notice of the legal mortgage, and had obtained possession of the deeds (*b*).

ii.—**In what Cases Omission of Mortgagee to obtain or retain Possession of Title Deeds will postpone his Security.**—The question as to what will amount to want of reasonable diligence on the part of a prior mortgagee in not calling for the title deeds, so as to give to a puisne mortgagee, who is in possession of the deeds, a preference over him, has been made the subject of much discussion.

Former doctrine that want of possession indicated fraud.

The early doctrine certainly was, that the mere want of possession was such evidence of fraud on the part of the first incumbrancer, though clothed with the legal estate, as of itself to postpone his security (*c*). A contrary opinion was, however, entertained by Lord Thurlow, who held there must be a voluntary leaving of the title deeds to entitle the second mortgagee to postpone the prior incumbrancer (*d*). The like opinion was entertained by Lord Cowper (*e*), and confirmed by a decision

(*y*) *Hipkins* v. *Amery*, 2 Giff. 292.
(*z*) *Hewitt* v. *Loosemore*, 9 Ha. 449; *Espin* v. *Pemberton*, 3 De G. & J. 547.
(*a*) *Wason* v. *Wareing*, 15 Beav. 151, 155.
(*b*) *Garnham* v. *Skipper*, 55 L. J. Ch. 263.
(*c*) See *Ryall* v. *Rolle*, 1 Atk. 165; *Goodtitle* v. *Morgan*, 1 T. R. 762; *Right* v. *Bucknell*, 2 B. & Ad. 278; *Head* v. *Egerton*, 3 P. Wms. 280.
(*d*) *Tourle* v. *Rand*, 2 Bro. C. C. 650.
(*e*) *Peter* v. *Russell*, 2 Vern. 726.

of the Court of Exchequer, in *Plumb* v. *Fluitt* (*f*). In *Evans* v. *Bicknell* (*g*), Lord Eldon, C., denied it to be an old-established rule that a second mortgagee with the title deeds, without notice of any prior incumbrance, should be preferred. The result of these decisions is to establish the principle that the want of possession of the title deeds by the first mortgagee is open to explanation, and is only *primâ facie*, and not conclusive, evidence of fraud (*h*). It is plain that a man may in many cases entrust another with all the *indicia* of ownership, including the legal title, and yet not deprive himself of his equitable rights (*i*).

Modern doctrine stated.

In a recent case (*k*), Fry, L. J., thus summed up the law on the subject: "The authorities which we have reviewed appear to us to justify the following conclusions: (1) That the Court will postpone the prior legal estate to a subsequent equitable estate (a) where the owner of the legal estate has assisted in or connived at the fraud which has led to the creation of a subsequent equitable estate, without notice of the prior legal estate, of which assistance or connivance the omission to use ordinary care in inquiry after or keeping title deeds may be, and in some cases has been held to be, sufficient evidence, where such conduct cannot otherwise be explained; (b) where the owner of the legal estate has constituted the mortgagor his agent with authority to raise money, and the estate thus created has, by the fraud or misconduct of the agent, been represented as being the first estate. But (2) that the Court will not postpone the prior legal estate to the subsequent equitable estate on the ground of any mere carelessness or want of prudence on the part of the legal owner."

This statement of the law must, however, now be read with reference to *Walker* v. *Linom* (*l*), and the cases there cited, from which it appears that fraud is not essential to deprive a purchaser of the benefit of the legal estate.

(*f*) Fonb. Eq. (5th ed.) vol. i. p. 167; 2 Anst. 432.

(*g*) 6 Ves. 183. And see *Allen* v. *Knight*, 16 L. J. Ch. 370.

(*h*) *Stevens* v. *Stevens*, 2 Coll. 20; *Beckett* v. *Cordley*, 1 Bro. C. C. 353; *Payne* v. *Compton*, 2 Y. & C. Ex. 457; *Brown* v. *Stedman*, 44 W. R. 458; *Taylor* v. *Russell*, (1892) A. C. 244.

(*i*) *Rimmer* v. *Webster*, (1902) 2 Ch. 163, per Farwell, J.

(*k*) *Northern Counties of England, &c. Co.* v. *Whipp*, 26 Ch. D. 482, at p. 494, C. A. See *Union Bank of London* v. *Kent*, 39 Ch. D. 238, C. A.

(*l*) See *ante*, p. 1359.

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Where mortgagee parts with possession of deeds fraudulently.

First. In the following cases the legal mortgagee was postponed by reason of his having assisted in or connived at fraud by neglecting to obtain or keep the title deeds.

Where a first mortgagee omitted, on completion of his mortgage, to obtain the title deeds from the mortgagor, who mortgaged the property to a second mortgagee without notice of the first mortgage, it was held that the first mortgagee must be postponed, as he must be deemed, under the circumstances, to have been accessory to drawing in the second mortgagee to lend his money (*m*).

So, where a purchaser who without requiring delivery of the title deeds takes a title from a mortgagee who has deposited the deeds by way of sub-mortgage, he is affected with constructive notice of the sub-mortgage (*n*).

Where a legal mortgagee, under circumstances amounting to wilful negligence, allows the mortgagor to retain the title deeds, he will lose his priority, not only as against a second mortgagee, who has obtained the deeds, but also as against any subsequent incumbrancer who makes inquiry and ascertains the position of the deeds, and lends his money in the belief that the holder of the deeds is the only prior incumbrancer (*o*).

These rules apply so as to deprive a purchaser of the protection of the legal estate. Thus, if the vendor convey the legal estate, but is allowed by the purchaser to retain the title deeds, an equitable deposit thereof by the vendor is preferred to the legal estate (*p*); so, also, where a purchaser of leaseholds omitted to require the counterpart of an underlease which had been deposited by the vendor by way of equitable mortgage (*q*).

So, in an Irish case (*r*), where purchasers of leaseholds entered on the premises, and expended money in erecting buildings thereon, without taking an assignment of the lease or obtaining the title deeds, and the vendor subsequently deposited the deeds with a bank as security for an advance to himself: it was held that the bank were entitled in priority.

Simultaneous mortgages.

Where two mortgages of the same estate are made simul-

(*m*) *Head* v. *Egerton*, 3 P. Wms. 280. See *Stanhope* v. *Earl Verney*, 2 Ed. 81.

(*n*) *Berwick* v. *Price*, (1905) 1 Ch. 632.

(*o*) *Clarke* v. *Palmer*, 21 Ch. D. 124.

(*p*) *Peto* v. *Hammond*, 30 Beav. 495.

(*q*) *Franklin* v. *Howes*, 24 L. T. N. S. 348.

(*r*) *Re Sloane's Estate*, (1895) 1 Ir. R. 146.

taneously to two persons, one of whom has the deeds delivered to him and the other makes no inquiry for them, the latter is postponed (*s*).

Mortgagee returning deeds to mortgagor.

Again, if a legal mortgagee who has, in the first instance, obtained possession of the title deeds afterwards hands them back to the mortgagor, unless for a sufficient reason and for a proper purpose, he will be liable to lose his priority (*t*).

Return of deeds to facilitate sale.

So, where the transferee of a mortgage by giving up the title deeds, other than the deed of transfer, to the transferor, who was the solicitor of the mortgagor, in order that an abstract might be prepared for a sale of the estate, enabled the solicitor to sell the estate as unincumbered, and abscond with the purchase-money (*u*).

Return of deeds on mortgagor's undertaking.

Similarly, if a mortgagee by deposit of deeds returns the deeds to the mortgagor, or parts with them to another creditor with the consent of the mortgagor on an undertaking that the deeds shall be restored to the mortgagee on payment of the other creditor's debt, the mortgagee will lose his security (*x*); but the debt due to the mortgagee will not be cancelled by a return of the deeds to the mortgagor (*y*).

Where mortgagor's possession of deeds is not accounted for.

Where a lessee made a legal mortgage of his term to secure an advance, and afterwards purported to execute another legal mortgage of the same property to another person to whom the lease was delivered; it was held that, inasmuch as no explanation was forthcoming as to how the lease came to be in the possession of the mortgagor at the time of the second advance, the priority of the first mortgage was lost (*z*).

Where mortgagee parts with deeds to enable mortgagor to effect a further loan.

Secondly, a legal mortgagee may lose the protection of the legal estate so as to be postponed to a subsequent incumbrancer without notice, if he allows the mortgagor to retain the title deeds, or hands them back to him with authority to raise money by means of them; in which case, if the mortgagor exceeds the limits of his authority, the legal mortgagee will lose his priority as against the subsequent incumbrancer to the full extent of the money so raised by the mortgagor (*a*).

(*s*) *Hopgood* v. *Ernest*, 3 De G. J. & S. 116.

(*t*) *Dowle* v. *Saunders*, 2 H. & M. 242. See *Fagg* v. *James*, 8 L. T. N. S. 5; *Layard* v. *Maud*, L. R. 4 Eq. 397.

(*u*) *Stevens* v. *Stevens*, 2 Coll. 20.

(*x*) *Re Driscoll*, Ir. R. 1 Eq. 285.

(*y*) *Hurst* v. *Beach*, 5 Madd. 351.

(*z*) *Jones* v. *Rhind*, 17 W. R. 1091. See *Spencer* v. *Clarke*, 9 Ch. D. 137; *Mason* v. *Rhodes*, 53 L. T. 322.

(*a*) *Rimmer* v. *Webster*, (1902) 2 Ch. 163.

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Allowing mortgagor to retain deeds for purposes of a limited loan.

So, where a first mortgagee allowed the title deeds to remain in the possession of the mortgagor, to enable him to give another limited security, and the mortgagor made several mortgages beyond the one contemplated, the subsequent mortgagees having no notice of the first mortgage: it was held that the first mortgagee must be postponed to them, and that notice of the first mortgage ought to have been indorsed on the last purchase deed (*b*).

Loan of lease for purpose of advance from third person.

Where a mortgagee of leaseholds lent the lease to the mortgagor to enable him to raise money upon it, directing the mortgagor to inform the proposed lender of the prior charge, and the mortgagor deposited the lease with his bankers as a security for a loan without giving them notice of the mortgage, it was held that the mortgage must be postponed to the deposit (*c*).

Mortgagee cannot recover lease deposited.

Although a mortgagee of a lease has the legal title to the lease, he cannot recover possession of it if he has permitted the mortgagor to deposit it with a third party for value without notice (*d*).

Prior security not postponed where omission to obtain deeds is owing to mere want of prudence.

Thirdly, the prior legal estate will not be postponed to the subsequent equitable estate on the ground of any mere carelessness or want of prudence on the part of the legal owner in not obtaining the title deeds in the first instance; or if he parts with them for a proper purpose, though the result of allowing the mortgagor to have possession of the deeds may enable him to deal with the property, concealing the mortgage from a subsequent incumbrancer or purchaser.

Where deeds are left with persons entitled thereto.

It is not negligence to leave documents in the possession of the joint-owner or co-partner (*e*); or of trustees, where the mortgage was only a part execution of a trust to raise a larger sum, and the possession of the deeds by the trustees was indispensable (*f*).

So where a mortgagor pays off part of the mortgage debt

(*b*) *Perry-Herrick* v. *Attwood*, 2 De G. & J. 21. See *Brocklesby* v. *Temperance Permanent Building Soc.*, (1895) A. C. 173; *Rimmer* v. *Webster*, *sup.*

(*c*) *Briggs* v. *Jones*, L. R. 10 Eq. 92. See *Peter* v. *Russell*, 2 Vern. 726.

(*d*) *Owen* v. *Knight*, 5 Sc. 307.

(*e*) *Cottam* v. *Eastern Counties Rail. Co.*, 1 J. & H. 243; *Carter* v. *Carter*, 3 K. & J. 617; *Cavander* v. *Bulteel*, L. R. 9 Ch. 79.

(*f*) *Harper* v. *Faulder*, 4 Madd. 129.

he is not bound to require production of the title deeds, and is not affected with constructive notice of a sub-mortgage (*g*).

So, also, trustees will not lose priority by reason of their allowing a co-trustee to have possession of the title deeds of property over which they have a mortgage (*h*).

Leaving deeds in possession of co-trustee.

A mortgagee will not lose his priority on the ground of negligence in parting with the title deeds of the mortgaged property merely because he delivers them for safe custody to his solicitor, who fraudulently obtains an advance on the security of them from a person who has no notice of the fraud (*i*), nor even when the solicitor is the mortgagor and the deeds are left in his hands (*k*).

Client leaving deeds with solicitor for custody.

Where a vendor, after entering into a binding contract for sale, but before completion, deposited the title deeds to secure an advance with a third person, it was held that the right of the purchaser to conveyance of the property on payment of the purchase-money was paramount to the equitable mortgage by deposit, and that the possession of the title deeds gave no priority to the mortgagee, for inasmuch as the purchaser had, as yet, no control over the deeds, there was no negligence on his part in respect of them (*l*).

Fraudulent deposit by vendor with third person before completion of purchase.

So, where the deeds relate also to other property not comprised in the mortgage, it is not negligence to leave them in the possession of the owners of such property (*m*).

Where deeds relate to other property.

A registered mortgage by assignment of a lease was held to prevail, although the lease was left with the lessee, who was thus enabled to surrender the lease and obtain a new one, there being no fraud in the assignee (*n*).

Where the title deeds had been left by the mortgagee in the hands of the mortgagor, under a false statement made by the latter that he had already deposited them with a third person, it was held not sufficient to postpone the mortgagee to a subsequent incumbrancer, though the mortgagee made no inquiries as to the truth of such deposit (*o*). But the excuse for not

False statement of mortgagor.

(*g*) *Berwick* v. *Price*, (1905) 1 Ch. 632.

(*h*) *Hooper* v. *Chambers*, W. N. (1890) 29. See *Powell* v. *London & Prov. Bank*, (1893) 2 Ch. 555.

(*i*) *Cook* v. *Bramwell*, W. N. (1890) 72, C. A.; *Jared* v. *Clements*, (1903) 1 Ch. 428, C. A.

(*k*) *Cottey* v. *Nat. Prov. Bank*, 20 T. L. R. 607.

(*l*) *Flynn* v. *Pountain*, W. N. (1889) 32.

(*m*) *Atterbury* v. *Wallis*, 8 De G. M. & G. 454.

(*n*) *Bailey* v. *Fermor*, 9 Pri. 262.

(*o*) *Frazer* v. *Jones*, 17 L. J. Ch. 353. See *Finch* v. *Shaw*, 5 H. L. C. 928; *Wallis* v. *Woodyear*, 2 Jur.

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delivering the title deed that it had been left at home by mistake, in the absence of any further inquiry, is not sufficient (*p*).

Fraudulent retainer by mortgagor of some of the deeds.

Where a mortgagor who was the mortgagee's solicitor was requested by the mortgagee to send to him the deeds, and the mortgagor accordingly sent a parcel purporting to contain all the deeds relating to the property, but which was subsequently found to contain the mortgage deed only: it was held that the mortgagee by omitting to examine the parcel had not been guilty of such negligence as to postpone his legal mortgage to subsequent equitable incumbrancers with whom the mortgagee had deposited the title deeds of the property as a security for a loan to himself (*q*). So, also, where a mortgagee had repeatedly asked for the deeds which the mortgagor, who was his solicitor, made excuses for not delivering up to him (*r*).

Where deeds delivered to mortgagee were not genuine.

Similarly, where on the mortgage of an estate the mortgagor's solicitor, who also acted for the mortgagee, handed over to the latter certain documents which he falsely represented to be the title deeds of the property; the mortgagor holding the genuine title deeds subsequently sold the property to a purchaser without notice of the mortgage: it was held that the mortgagee had not been guilty of such negligence as to deprive him of the benefit of his mortgage (*s*).

Mortgagee parting with deeds for proper object not postponed.

Generally, if the mortgagee parts with the deeds *with due caution*, and for a proper object, but they come into other hands through the wrongful act of a third person, the mortgagee is entitled to retain his priority (*t*).

So where the mortgagee of a lease gave up the lease to the mortgagor to show it to an intending purchaser, and the mortgagor then sold the lease, the mortgagee prevailed, but only because his solicitor had given notice to the purchaser's solicitor of the mortgagee's right before the purchase-money was paid (*u*).

So, also, where the title deeds have got out of the possession

179; *Roberts* v. *Croft*, 2 De G. & J. 1.

(*p*) *Spencer* v. *Clarke*, 9 Ch. D. 137.

(*q*) *Ratcliffe* v. *Barnard*, L. R. 6 Ch. 652; *Dixon* v. *Muckleston*, L. R. 8 Ch. 155; *Atherley* v. *Burnett*, 52 L. T. 736. See *ante*, p. 1358.

(*r*) *Manners* v. *Mew*, 29 Ch. D. 725; cf. *Oliver* v. *Hinton*, (1899) 2 Ch. 264, C. A.

(*s*) *Finch* v. *Shaw*, 18 Jur. 935; affd. in D. P. *sub nom. Colyer* v. *Finch*, 5 H. L. C. 905.

(*t*) *Exp. Meux*, 1 Gl. & J. 116; *Rimmer* v. *Webster*, (1902) 2 Ch. 163.

(*u*) *Martinez* v. *Cooper*, 2 Russ. 198.

of the mortgagee, but without any fault on his part, he will not be postponed (*x*); as, for instance, where a client and his solicitor advanced money on a contributory mortgage, which was taken in the name of the solicitor alone, and the title deeds were handed over to and kept with the client's solicitor, who deposited them with a bank as security for a loan to himself: it was held that the client had priority over the security to the bank to the amount of his contribution to the original loan (*y*).

So where one of two mortgagee-executors handed back the deeds to the mortgagor for the purpose of raising money to pay off the mortgage, and the mortgagor subsequently pledged some of them to a bank, the other and surviving executor was entitled to priority over the bank (*z*).

The manager of a company executed a legal mortgage of his own property to the company and delivered the deeds to them; the deeds were placed in a safe of the company of which the mortgagor as manager held the key; the mortgagor subsequently executed a mortgage of the same property to secure an advance to himself, and he then took the title deeds out of the safe and delivered them to the second mortgagee: it was held that the mortgage to the company had priority over the second mortgage (*a*).

Mortgagee not entitled to deeds not postponed.

Where the interest created by a legal mortgage is such as not to entitle the mortgagee to require delivery of the title deeds, as in the case of a mortgage for a term of years, his legal security will not be postponed to a subsequent incumbrancer who obtains possession of the deeds (*b*).

Rule as between equitable incumbrancers.

The principles illustrated by the foregoing decisions also apply, as between successive equitable incumbrancers, one of whom has obtained possession of the title deeds. There is, however, some doubt on this point, and the weight of authority seems to favour the view that the same amount of negligence is necessary in both cases: that the negligence necessary to displace one of two equities is the same negligence which is necessary to displace the legal estate. This view is supported

(*x*) *Allen* v. *Knight*, 11 Jur. 527.

(*y*) *Bradley* v. *Riches*, 9 Ch. D. 189. See also *Re Vernon Ewens & Co.*, 33 Ch. D. 402, C. A.; *Carritt* v. *Real and Personal Advance Co.*, 42 Ch. D. 263.

(*z*) *Re Ingham, Jones* v. *Ingham*, (1893) 1 Ch. 352.

(*a*) *Northern Counties of England Fire Insurance Co.* v. *Whipp*, 26 Ch. D. 482, C. A.

(*b*) *Harper* v. *Faulder*, 4 Madd. 129. But see *Wiseman* v. *Westland*, 1 Y. & J. 117.

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by Turner, L.J. (*c*), Lord Cairns (*d*), Lord Cranworth (*e*), and Lord Selborne (*f*). And Kay, L.J. (*g*), said: "Nothing short of a decision of the House of Lords can overrule the law so laid down." On the other hand, Lord Macnaghten (*h*) said he was not convinced of the correctness of the view taken by Kay, J.; and in several other cases (*i*) that view of Kay, J., was not taken by the Court.

But however this may be, there are undoubtedly cases where an equitable mortgagee who has allowed his mortgagor to retain or regain possession of the title deeds has been postponed to a subsequent equitable incumbrancer who has obtained possession of the deeds (*k*). Where, however, the relationship between the equitable incumbrancer and the person in possession of the deeds is not merely that of mortgagee and mortgagor, but is of a fiduciary nature, such as *cestui que trust* and trustee or client and solicitor, the equitable incumbrancer will not be deprived of his priority by reason of the improper acts of the person entrusted with the deeds, so long, at all events, as the incumbrancer had no ground to suppose that there was any want of good faith on the part of the custodian of the deeds (*l*).

Omission to register.

An equitable mortgage in Ireland which is not registered will be postponed to a subsequent equitable charge which is registered without notice of the prior charge (*m*).

Laches of mortgagee in requiring mortgagor to return deeds.

Where a first equitable mortgagee, by deposit, lent the deeds to the mortgagor upon his representation that they were required for production on sale of the equity of redemption of the property, together with his promise to return the deeds forthwith, and never applied to have the deeds back for more than four years, he was postponed to a subsequent depositee without notice (*n*).

(*c*) *Cory* v. *Eyre*, 1 D. J. & S. at p. 167.

(*d*) *Shropshire Union Canal Co.* v. *Reg.*, L. R. 7 H. L. at p. 507.

(*e*) *Roberts* v. *Croft*, 2 D. & J. 1.

(*f*) *Dixon* v. *Muckleston*, L. R. 8 Ch. at p. 161.

(*g*) *Taylor* v. *Russell*, (1891) 1 Ch. 8.

(*h*) (1892) A. C. at p. 262.

(*i*) *Rice* v. *Rice*, 2 Drew. 73; *Layard* v. *Maud*, L. R. 4 Eq. 397, at p. 406; *National Provincial Bank* v. *Jackson*, 33 Ch. D. 1, at pp. 12, 13, C. A.; *Farrand* v. *Yorkshire Banking Co.*, 40 Ch. D. 182, at p. 189; *Kelly* v. *Munster and Leinster Bank*, 29 L. R. Ir. 19, C. A. As to possession of title deeds as conferring the best right to call for an outstanding legal estate, see *ante*, pp. 1245 *et seq.*

(*k*) As for instance, *Farrand* v. *Yorks. Banking Co.*, 40 Ch. D. 182.

(*l*) *Taylor* v. *London and County Banking Co.*, (1901) 2 Ch. 321, C. A. See *Walker* v. *Linom*, (1907) 2 Ch. 104.

(*m*) *Fullerton* v. *Prov. Bank of Ireland*, (1903) A. C. 309.

(*n*) *Waldron* v. *Sloper*, 1 Drew. 193; *Farrand* v. *Yorks. Banking Co.*, 40 Ch. D. 182.

And where a depositee gives up the deeds upon an assurance that securities of equal value will be given him, he is postponed (*o*).

Similarly, where a vendor, before payment of his purchase-money, executed and gave to the purchaser a conveyance of the property, with a receipt endorsed for the whole of the purchase-money, and delivered the title deeds to the purchaser, who deposited them with a third person as security for a loan, it was held the vendor's lien must be postponed to the deposit (*p*).

Rule as between equitable mortgagees.

Even as between two equitable incumbrancers, however, the prior incumbrancer will not be postponed by reason of his not having obtained possession and kept the title deeds if the absence of the deeds can be satisfactorily accounted for (*q*), or it is represented that all the title deeds have been delivered (*r*).

Return of deed to mortgagor under false pretence.

Where, after an equitable deposit of an agreement for a lease, the depositor obtained back possession of the agreement under the false pretence that the document was required to be produced for the purpose of obtaining a licence and gave an undertaking to return it; the depositor then deposited the agreement with another person as security for the advance: it was held that the priority of the first depositee was not lost (*s*).

Fresh inquiry as to absent deeds on further advance.

Although a mortgagee, who allows the deeds to be retained by the mortgagor after proper inquiry and upon sufficient explanation, may not have his security postponed in respect of his original advance, yet if he makes a further advance without again inquiring as to the title deeds he will be precluded from tacking such further advance as against a mesne incumbrancer who has possessed himself of the deeds (*t*).

(*o*) *Re Lord Southampton's Estate, Allen* v. *Southampton*, 16 Ch. D. 178.

(*p*) *Rice* v. *Rice*, 2 Drew. 73. See *Bickerton* v. *Walker*, 31 Ch. D. 151; *Rimmer* v. *Webster*, (1902) 2 Ch. 163.

(*q*) *Dixon* v. *Muckleston*, L. R. 8 Ch. 155.

(*r*) *Roberts* v. *Croft*, 2 De G. & J. 1. See also *Re Lambert's Estate*, 13 L. R. Ir. 234, C. A.

(*s*) *Exp. Reid, Re Buckland*, 12 Jur. 533. See *Hall* v. *West End Advance Co.*, 1 C. & E. 161.

(*t*) *Garnham* v. *Skipper*, 55 L. J. Ch. 263.

CHAPTER LIX.

PRIORITIES AS BETWEEN MORTGAGES AND JUDGMENTS, CROWN DEBTS, AND OTHER CHARGES AND LIENS.

SECTION I.

JUDGMENTS.

No priority beyond interest of party.

1.—Judgments as affecting Land generally.—Priority cannot be given by a person in respect of any estate beyond his own interest; so where a devisee for life of leaseholds borrowed money to pay the rent, and gave a mortgage for the amount, the mortgagee could not claim priority over charges of the judgment creditors of the testator (*a*).

Judgment creditor can take only what belongs to debtor.

A judgment creditor can only take what belongs to the debtor, and, accordingly, a judgment creditor perfecting his judgment, after a mortgage created by the debtor subsequently to the judgment being entered up, would be postponed to such mortgage (*b*).

Judgment postponed to prior equitable charge,

It is only the beneficial interest of the debtor in the lands upon which the judgment attaches (*c*); therefore a judgment creditor will be postponed to a prior equitable charge, as by deposit of title deeds, notwithstanding his legal title (*d*).

to simple debts of ancestor, or testator,

On the same principle, a judgment against an heir for his own debt is postponed to the simple contract debts of the ancestor, as the heir takes no beneficial interest, except subject to such debts (*e*). The like rule applies to the judgment creditor of the devisee and the creditors of the testator.

trusts for other persons,

So, also, a judgment creditor cannot take property in the possession of the debtor as trustee for other persons (*f*).

(*a*) *Angell* v. *Bryan*, 2 J. & L. 763.

(*b*) *Warburton* v. *Hill*, Kay, 470 (see *Haly* v. *Barry*, L. R. 3 Ch. 458); *Benham* v. *Keane*, 3 De G. F. & J. 318; *Scott* v. *Lord Hastings*, 4 K. & J. 633.

(*c*) *Eyre* v. *McDowell*, 9 H. L. C. 642; *Abbot* v. *Stratten*, 3 J. & L. 614; *Beavan* v. *Lord Oxford*, 6 De G. M. & G. 507.

(*d*) *Whitworth* v. *Gaugain*, 3 Ha. 416.

(*e*) *Langton* v. *Horton*, 1 Ha. 549.

(*f*) *De Sorbein* v. *Bland*, 2 De G. & J. 158.

A judgment creditor can only take subject to all equities against his debtor, whether it be the equity of a wife against her husband (*g*); or of a purchaser for value who has paid his purchase-money without obtaining a conveyance (*h*); or of a mortgagee or purchaser taking by defective, or ineffectual, conveyance from the debtor (*i*); or of *cestuis que trust* under a trust deed for sale executed by the debtor (*k*); but a judgment completed after the date, but before the execution by any of the creditors, of a deed of trust for creditors, will have priority (*l*).

to prior equities.

So a voluntary settlement in favour of third persons is unaffected by a subsequent judgment against the settlor (*m*); but a bare voluntary trust for sale, when merely equivalent to an authority to sell for the settlor's own benefit, would, it is apprehended, be subject to judgments entered up against him prior to a binding contract being entered into by the trustee (*n*).

It is immaterial whether the judgment creditor had notice of the prior interests affecting the property (*o*).

Judgments are still subject to trusts for sale as under the old law, under which the following points have been decided.

Judgments are subject to trusts for sale.

If a trust for sale of real estate was once well created, with power for the trustees to give discharges, the existence of subsequent judgments against the grantor did not prejudice the title (*p*). So, also, where a judgment debtor was beneficially interested in a trust for sale created by another, the judgment did not form a lien on the moneys arising from the estate (*q*), nor was it material that the sale was by the Court (*r*). So, if a judgment was entered up after contract for sale and payment of the purchase-money, but prior to the conveyance, the purchaser would be relieved against it in equity (*s*). It was held that a purchaser, after notice of a judgment against the

(*g*) *Newlands* v. *Paynter*, 4 My. & Cr. 408.
(*h*) *Finch* v. *Earl of Winchelsea*, 1 P. Wms. 278.
(*i*) *Prior* v. *Penpraze*, 4 Pri. 99.
(*k*) *Lodge* v. *Lyseley*, 4 Sim. 70.
(*l*) *Langhorne* v. *Harland*, 4 W. R. 96.
(*m*) *Beavan* v. *Lord Oxford*, 6 De G. M. & G. 492, 507.
(*n*) Dart, V. & P. (6th ed.) p. 530.
(*o*) *Benham* v. *Keane*, 1 J. & H. at p. 697. See *S. C.*, 3 De G. F. & J. 318.
(*p*) *Lodge* v. *Lyseley*, 4 Sim. 70.
(*q*) *Browne* v. *Cavendish*, 1 J. & L. 606, 628; *Robinson* v. *Hedger*, 17 Sim. 183.
(*r*) *Alexander* v. *Crosby*, 1 J. & L. 666, 672.
(*s*) *Finch* v. *Earl of Winchelsea*, 1 P. Wms. 277. See 2 & 3 Vict. c. 11, s. 5.

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vendor, could not pay the purchase-money to him without being liable (*t*); but in another case an ejectment against a purchaser in possession by a creditor, who had sued out an *elegit* on such a judgment, was restrained by injunction (*u*).

ii.—**Statutory Enactments regulating the Priority of Judgments.**—The priority of a judgment creditor over subsequent incumbrancers has long depended on his observance of statutory requirements.

Docketing.

Formerly, judgments, in order to secure priority over subsequent incumbrances, were required to be docketed; but the dockets were closed by the stat. 1 & 2 Vict. c. 11, which provided that judgments already docketed should be registered under the Act next referred to.

Registration under 1 & 2 Vict. c. 110.

The stat. 1 & 2 Vict. c. 110, s. 19, provided that no judgment should affect any lands, tenements, or hereditaments as against mortgagees, unless such judgment was duly registered in the prescribed manner. This section is now repealed (*x*); and except by an order of the Court, no entry can now be made in any register kept under that section (*y*).

Re-registration under 2 & 3 Vict. c. 11.

By the stat. 2 & 3 Vict. c. 11, s. 4 (*z*), the registration of judgments under the stat. 1 & 2 Vict. c. 110 is made null and void as against a mortgagee after the expiration of five years from the date of the entry thereof, unless re-registered within five years prior to the execution of his mortgage. This section is now repealed, except so far as it applies to *lis pendens* (*a*); and except by an order of the Court no registration can now be made under it (*b*).

Effect of omission to re-register.

If the judgment was not re-registered before the expiration of the five years, and an interval elapsed before re-registration, the effect is this: the previous purchasers, mortgagees, and creditors were bound by the judgment, just as they were before, although no re-registration ever took place; the judgment was only void against purchasers, mortgagees, and creditors in the

(*t*) *Forth* v. *The Duke of Norfolk*, 4 Madd. 505.
(*u*) *Brunton* v. *Neale*, 14 L. J. Ch. 8.
(*x*) 63 & 64 Vict. c. 26, sched.
(*y*) *Ibid.* s. 2 (3).
(*z*) Extended to Palatine Courts of Lancaster and Durham by 18 & 19 Vict. c. 15, s. 3.
(*a*) 63 & 64 Vict. c. 26.
(*b*) *Ibid.* s. 2 (3).

interval (*c*); but not against purchasers, mortgagees, and creditors subsequent to re-registration (*d*).

The failure to re-register the judgments every five years does not affect the priority of registered judgment creditors *inter se,* but only as regards subsequent purchasers, mortgagees and creditors (*e*).

But a judgment once registered remains valid against any subsequent mortgagee who searches and finds that judgment on the register during the period for which he is bound to search, whether such judgment is re-registered or not (*f*).

Extent of protection by re-registration.

The provisions as to re-registration are operative for the benefit of all persons deriving title, mediately or immediately, from the judgment debtor, and not merely for that of immediate purchasers, mortgagees, and creditors of the debtor himself (*g*).

Registration of judgment and writ of execution under 23 & 24 Vict. c. 38.

The stat. 23 & 24 Vict. c. 38 did not abrogate the necessity for registration of judgments as required by the stat. 1 & 2 Vict. c. 110, but added a provision (sect. 1) that a judgment should not affect lands as against a mortgagee, until a writ or other process of execution had been issued and registered in the name of the judgment creditor, nor unless such execution or other process was executed and put in force within three calendar months from the time when it was registered.

The effect of this enactment was that, as from the 23rd July, 1860, until the commencement of the next-mentioned Act, both the judgment and the writ of execution or other process must have been registered. This enactment is now repealed, and except under an order of the Court, no registration can now be made under it (*h*).

Registration of writ of execution under 27 & 28 Vict. c. 112.

No registration of writs of execution was required by 27 & 28 Vict. c. 112 (*i*), except for the purposes of a sale under sect. 4, but actual delivery in execution was sufficient to create a charge on land, and give priority over a subsequent incumbrancer (*k*). Now, however, by the next-mentioned Acts, delivery in execu-

(*c*) *Freer* v. *Hesse,* 4 De G. M. & G. 502; *Shaw* v. *Neale,* 6 H. L. C. 581; *Simpson* v. *Morley,* 2 K. & J. 71.

(*d*) *Beavan* v. *Earl of Oxford,* 6 De G. M. & G. 492.

(*e*) *Re Boyse,* (1910) 1 Ir. R. 292.

(*f*) *Re Lord Kensington,* 29 Ch. D. 527.

(*g*) *Benham* v. *Keene,* 3 De G. F. & J. 318.

(*h*) 63 & 64 Vict. c. 26, s. 2 (3).

(*i*) Now repealed as to sects. 1, 2, 3, and part of 4 by 63 & 64 Vict. c. 26, sched.

(*k*) *Re Pope,* 17 Q. B. D. 743, C. A.

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tion is void as against a mortgagee or purchaser unless the writ or order is registered.

Stat. 51 & 52 Vict. c. 51.

By the Land Charges Registration and Searches Act, 1888 (*l*), it is enacted as follows:

Register of writs and orders affecting land.

Sect. 5. "(1.) There shall be established and kept at the Office of Land Registry a register of writs and orders affecting land; and there may be registered therein, in the prescribed manner, any writ or order affecting land issued or made by any Court for the purpose of enforcing a judgment, statute or recognizance, and any order appointing a receiver or sequestrator of land.

"(2.) Every entry made in pursuance of this section shall be made in the name of the person whose land is affected by the writ or order registered.

"(3.) The registration of a writ or order in pursuance of this Act shall cease to have effect at the expiration of five years from the date of the registration, but may be renewed from time to time, and, if renewed, shall have effect from the date of renewal.

"(4.) Registration of a writ or order in pursuance of this section shall have the same effect as and make unnecessary registration thereof in the Central Office of the Supreme Court of Judicature in pursuance of any other Act."

Protection of purchaser against unregistered writs and orders.

Sect. 6. "Every such writ and order as is mentioned in section five, and every delivery in execution, or other proceeding taken in pursuance of any such writ or order, or in obedience thereto, shall be void as against a purchaser for value of the land unless the writ or order is for the time being registered in pursuance of this Act.

"Provided that (*m*)—

(b) Where the proceeding in which the writ or order was issued or made is for the time being registered as a *lis pendens* in the name of the person whose land is affected by the writ or order, nothing in this section shall affect the operation of such registration."

Meaning of land.

The word "land" in this Act includes "lands, messuages, tenements and hereditaments, corporeal and incorporeal of any tenure" (*n*). Equitable interests in land are not here expressly mentioned, but the Land Charges Act, 1900, applies to any interest in land or unpaid purchase-money for any land.

The words "purchaser for value" include mortgagee (*o*).

As regards the debtor himself and persons claiming under him other than purchasers for value, registration under this Act is not necessary to bind the lands.

(*l*) 51 & 52 Vict. c. 51. For definition of "land charge," see sect. 4, *post*, p. 1389.

(*m*) Proviso (a) to sect. 6 is repealed. See 63 & 64 Vict. c. 26.

(*n*) Sect. 4.

(*o*) *Ibid.*

Sect. 6 of the Searches Act, 1888, applies to every writ and order affecting land issued or made by any Court for the purpose of enforcing a judgment whether obtained on behalf of the Crown or otherwise, and whether obtained before or after the commencement of the Land Charges Act, 1900, and to every delivery in execution or other proceeding taken in pursuance of any such writ or order or in obedience thereto (*p*).

Notice of unregistered judgment.

Power to vacate the registration of a writ or order affecting land (formerly wanting) has been given by the Settled Land Act, 1890 (*q*).

The stat. 18 & 19 Vict. c. 15, ss. 4 and 5, enacts that no notice of a judgment not registered or not re-registered shall affect purchasers, mortgagees, or creditors.

And generally a purchaser or mortgagee is not now affected by notice of any judgment not registered or not re-registered in the Office of the Land Registry; and he may always be satisfied with a five years' search (*r*).

It is apprehended that, if a judgment and execution thereon, requiring registration, have not been duly registered in the Office of the Land Registry, so as to be a charge on the land, no notice thereof will have any effect, even in regard to lands in a registry county; but if such registry in the Office of the Land Registry has been completed, although there has been no registry of the judgment in the county registry, a subsequent mortgagee or purchaser with notice of such judgment would be postponed to the judgment as before, although the mortgage or purchase deed were duly registered in the county registry (*s*).

Land Charges Act, 1900.

By the Land Charges Act, 1900 (*t*), which is to be construed as one with the Land Charges Registration and Searches Act, 1888, and which provides for the transfer to the Land Registry Office of the business relating to the registry of judgments, it is enacted as follows:—

Sect. 2.—(1) A judgment or recognizance whether obtained or entered into on behalf of the Crown or otherwise, and whether obtained or entered into before or after the commencement of this Act, shall not operate as a charge on land, or on any interest in land, or on the unpaid purchase-money for any

(*p*) 63 & 64 Vict. c. 26, s. 3.
(*q*) 53 & 54 Vict. c. 69, s. 19.
(*r*) *Benham* v. *Keane*, 3 De G. F. & J. 318.
(*s*) See 63 & 64 Vict. c. 26, s. 4. As to registration in counties, see *inf.* p. 1378.
(*t*) 63 & 64 Vict. c. 26.

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land, unless or until a writ or order for the purpose of enforcing it is registered under sect. 5 of the Land Charges Registration and Searches Act, 1888.

(2) This section shall apply to any inquisition finding a debt due to the Crown, and any obligation or specialty made to the Crown, and any acceptance of office from or under the Crown, whatever may have been its date, in like manner as it applies to a judgment.

(3) Except under an order of the High Court no entry shall be made in any register kept under sects. 19, 21 of the Judgments Act, 1838 (1 & 2 Vict. c. 110), sect. 8 of the Judgments Act, 1839 (2 & 3 Vict. c. 11), the Law of Property Amendment Act, 1860 (23 & 24 Vict. c. 38), the Judgments Act, 1864 (27 & 28 Vict. c. 112), or the Crown Suits, &c. Act, 1865 (28 & 29 Vict. c. 104).

It is not clear whether a mortgagee or purchaser who has notice of a judgment on which land has been delivered in execution by virtue of a writ or order issued on or after the 1st of January, 1889, but not registered under the Land Charges Registration and Searches Act, 1888 (*u*), will be postponed to the judgment creditor. But inasmuch as notice of the judgment itself is inoperative to postpone a mortgagee or purchaser (*x*), and as by the Act of 1888 (*y*) every such writ or order and every delivery in execution is "void as against a purchaser for value," unless registered, it would seem that an unregistered writ or order cannot affect the lands though actually delivered in execution, as against a mortgagee or purchaser, though he has notice of the judgment. It will, however, be prudent until the point is decided for a mortgagee having notice of a judgment, whether entered before or since 1888, to require the concurrence of the judgment creditor (*z*).

Result of the statutory enactments.

The result of the foregoing remarks is to show that, at the present time, a person lending money on the security of land is liable to have his security postponed in any of the following cases:—

1. If the judgment was entered up prior to the 23rd July, 1860, and has been duly registered and re-registered under the stat. 1 & 2 Vict. c. 110, and 2 & 3 Vict. c. 11; and if the last

(*u*) 51 & 52 Vict. c. 51.
(*x*) 18 & 19 Vict. c. 15, ss. 4, 5, *sup.*
(*y*) Sect. 6.
(*z*) See Elphinstone and Clark on Searches, App. 16, 17.

registration took place within five years last preceding the date of the security. Search for such judgments should be made in the Central Office for five years last past; if no judgment is found registered within this period, the mortgagee will be safe; if any judgment appears on the register, it will effectually bind him unless the judgment debt is barred by the Statute of Limitations.

2. If the judgment was entered up between the 23rd July, 1860, and the 29th July, 1864, and has been duly registered and re-registered within the last preceding five years under the stat. 1 & 2 Vict. c. 110; and if the writ of execution has also been duly registered under the stat. 23 & 24 Vict. c. 38, and if the writ has been executed within three calendar months after registration thereof; and, even if a writ has been registered within three calendar months last preceding the date of the security, the security will be liable to be postponed, if the land is taken in execution before the expiration of the three months. The Central Office must be searched for five years past for judgments entered between the last-mentioned dates, and, if any appear, further search must be made of the register of writs of execution for three calendar months last past before completion. In practice it is generally considered sufficient to make these searches, and also to make inquiries for the purpose of ascertaining whether the land has been delivered in execution under a writ registered more than three months past; but it is obvious that perfect safety can only be obtained by searching the register of writs for the whole period since the entry of the judgment.

3. If the judgment was entered up between the 29th July, 1864, and the 1st January, 1889, and the land has been actually delivered in execution by writ of *elegit* or by appointment of receiver (*a*), or other equitable process; but in such case no registration of either the judgment or the writ is required merely to give priority to the charge of the judgment creditor, though the writ of execution must have been registered if it was desired to proceed to a sale. The result is that, as regards judgments entered up during the last-mentioned period, an intending mortgagee may find some difficulty in ascertaining

(*a*) The appointment of a receiver is a "process of execution" within the meaning of 27 & 28 Vict. c. 112. See *Benham* v. *Keane*, 3 De G. F. & J. 318. See also, *ante*, p. 672.

whether any such judgment is a charge upon the land. Land may be delivered in execution, either legal or equitable, without any publicity. In the former case inquiry may be made of the under-sheriff as to whether he has executed the writ of *elegit*, but he is not bound to answer such inquiries. Inquiries should also be made of tenants as to the person to whom they pay their rent, which appears to be the only mode of ascertaining whether the lands have been taken in equitable execution by appointment of receiver.

4. If the judgment was entered up on or after the 1st January, 1889, and the land has been actually delivered in execution as before, and if the writ of execution has been duly registered and re-registered, and if the last registration or re-registration took place within five years last preceding the date of the security. As regards such judgments it will be sufficient for the complete protection of a mortgagee to search the Land Registry Office for writs of execution for five years last past.

5. If after the 1st July, 1901, a writ or order for enforcing a judgment, whether obtained before or after that date, has been registered under sect. 5 of the Land Charges Registration and Searches Act, 1888.

iii.—Registration of Judgments in Counties.—In order to bind lands in particular counties, judgments were required to be registered therein.

Yorkshire.

By the several Yorkshire Registry Acts (*b*) formerly in force, it was provided that no judgment, statute, or recognizance (other than such as should have been entered into in the name and upon the proper account of his Majesty), should affect or bind any manors, lands, tenements, or hereditaments in the county of York, unless a memorandum of such judgment, statute, or recognizance was entered at the register office, in manner therein directed.

By the Yorkshire Registries Act, 1884 (*c*), it is provided that, for the purposes of the Act, the expression "assurance" shall include an "order of Court," and that the latter expression shall include a "judgment, decree, or writ of execution

(*b*) 5 & 6 Anne, c. 18, s. 4, West Riding of York; 6 Anne, c. 35, s. 19, West Riding and Kingston-upon-Hull; 8 Geo. II. c. 6, ss. 18, 19, North Riding.

(*c*) 47 & 48 Vict. c. 54, s. 3.

or sequestration." And the same Act (*d*) provides that "assurances" may be registered, and shall rank in priority according to the date of their registration.

Middlesex.

In Middlesex, judgments, &c. were formerly required to be registered in order to bind lands and hereditaments in that county, and were binding from the time at which they were memorialized (*e*). But by the Lands Registry (Middlesex Deeds) Act, 1891 (*f*), it is enacted that it shall not be necessary for the validity of any judgment, statute, or recognizance that a memorial thereof shall be registered under the Middlesex Registry Act, 1708. And now by the Land Charges Act, 1900 (*g*), the Middlesex Registry Act, 1708, does not apply to any instrument made after the 1st July, 1901, and capable of registration under the Land Charges Act, 1900, or the Act of 1888.

The stat. 1 & 2 Vict. c. 110, and the subsequent statutes, contain no exception of the registry counties, and, therefore, to affect lands situate there, both kinds of registration were necessary (*h*); and, as regards lands in Yorkshire, registration in the local registries is still necessary as well as registration of the writ or process of execution in the Land Registry Office (*i*). Judgments upon lands in the registry counties were binding, when registered in the Common Pleas or Central Office, from the time of registration under the Register Acts.

Under the old law a mortgagee whose security was duly registered in Middlesex was not bound by a prior judgment not registered there without actual notice (*k*); so a mortgage registered in that county prevailed over an earlier judgment not registered there, though registered in the Common Pleas or Central Office (*l*).

Ireland.

Judgments do not require to be registered under the Irish Registry Acts, but have preference according to their date of entry over all subsequent deeds although registered, and even

(*d*) Sects. 4, 14, *ante*, p. 1270.

(*e*) 7 Anne, c. 20, s. 19, now repealed.

(*f*) 54 & 55 Vict. c. 64, s. 6. By this Act the business of the registry was transferred to the Office of the Land Registry.

(*g*) 63 & 64 Vict. c. 26, s. 4.

(*h*) *Benham* v. *Keane*, 3 De G. F. & J. 318; *Johnson* v. *Holdsworth*, 1 Sim. N. S. 106; *Exp. Allcard*, Fonb. Bky. 217.

(*i*) *Sup.*

(*k*) *Benham* v. *Keane*, *sup.*; *Johnson* v. *Holdsworth*, *sup.* at p. 108; *Tunstall* v. *Trappes*, 3 Sim. 301; *Robinson* v. *Woodward*, 4 De G. & S. 562. *Secus*, if the judgment creditor had notice. *Johnson* v. *Holdsworth*, 1 Sim. N. S. 106.

(*l*) *Westbrooke* v. *Blythe*, 3 E. & B. 737.

over all unregistered deeds, although prior in date; although there was a difference of opinion between the authorities (*m*).

The principle is familiarly expressed by saying that the registered deed carries up the judgment "on its back" (*n*).

The Act for the protection of purchasers against judgments obtained in Ireland only requires that a fresh memorandum of such judgments shall be left with the proper officer every twenty years for the purpose of preserving the creditor's rights and remedies as against purchasers, mortgagees, and other creditors (*o*).

Charging order operates as equitable execution.

iv.—Charging Orders.—Where a judgment debtor is entitled to a beneficial interest in Government stocks, funds or annuities, or in the stock or shares of a public company, the proper mode of enforcing the judgment so as to bind such interest is to obtain a charging order, which will operate by way of equitable execution (*p*); and where such an order cannot be made, he may obtain an order appointing a receiver by way of equitable execution (*q*).

Ord. XLVI. r. 1.

By Ord. XLVI. r. 1, of the Rules of the Supreme Court, it is provided as follows:—

Application for and effect of charging order.

"An order charging stock or shares may be made by any Divisional Court or by any judge, and the proceedings for obtaining such order shall be such as are directed, and the effect shall be such as is provided by the Acts 1 & 2 Vict. c. 110, ss. 14 and 15, and 3 & 4 Vict. c. 82, s. 1."

The stat. 1 & 2 Vict. c. 110 (*r*), referred to in this rule, enacts by sect. 14 that stock and shares in public funds and public companies belonging to the debtor may be charged with payment of the judgment debt, and by sect. 15 that a charging order is to be made in the first instance *ex parte* and on notice to the bank or company to operate as a distringas.

By the stat. 3 & 4 Vict. c. 82, the provisions of 1 & 2 Vict. c. 110, s. 14, were extended to contingent interests in stock and

(*m*) *Latouche* v. *Lord Dunsany*, 1 Sch. & L. 134, 161; and *D'Arcy* v. *Chambers*, 1 Sch. & L. 468.

(*n*) *Ante*, p. 1274.

(*o*) See 7 & 8 Vict. c. 90, ss. 6, 7. But see 13 & 14 Vict. c. 29, s. 4.

(*p*) *Brereton* v. *Edwards*, 21 Q. B. D. 488, C. A.

(*q*) *Re Anglesey, Galve* v. *Gardner*, (1903) 2 Ch. 727; *Ideal Bedding Co.* v. *Holland*, (1907) 2 Ch. 157.

(*r*) See the Irish Act (3 & 4 Vict. c. 105).

shares and the dividends thereof, and to stock, funds, shares or annuities in Court.

When a charging order may be made.

A charging order can only be made in cases where the sum ordered to be paid is ascertained by the judgment (*s*). But where the order is for payment of a certain sum at a future date, the creditor is at once entitled to obtain a charging order upon stock and shares of the debtor (*t*).

A judgment cannot be enforced by a charging order as against the separate property of a married woman which she is restrained from anticipating; but the restraint will not prevent such an order from binding arrears of income of the property, accrued due at or before the date of the judgment (*u*), but not arrears accruing due after that date (*x*).

How application for charging order should be made.

Under sect. 15 of the stat. 1 & 2 Vict. c. 110, the application in the first instance is to be made *ex parte*, without notice to the debtor. It is now usually made by summons before a judge in chambers. The application should be supported by evidence of the applicant's title to the debt and of the debtor's title to the property sought to be charged (*y*).

Service of order *nisi*.

The order should be served on the debtor or his solicitor, or agent (*z*), and be lodged at the Chancery Pay Office if the fund is in Court; or be served, if the fund is not in Court, on the Bank of England or company whose stock or shares are affected thereby (*a*).

A *cestui que trust* is entitled to obtain from his trustee an authority enabling him to ascertain whether there is any charging order on the trust fund (*b*).

A master in the King's Bench Division may make a charging order *nisi*, but cannot discharge it (*c*). Upon the application of the debtor the matter may be adjourned into Court, when the order may be set aside, though it has not been made absolute (*d*).

Costs.

If the defendant pays the debt after the order *nisi*, he must

(*s*) *Widgery* v. *Tepper*, 6 Ch. D. 364, C. A., overruling *Burns* v. *Irving*, 3 Ch. D. 291.

(*t*) *Younghusband* v. *Gisborne*, 1 De G. & S. 209; *Bagnall* v. *Carlton*, 6 Ch. D. 130, affd. on other points, *Ibid.* 371, C. A.

(*u*) *Hood-Barrs* v. *Heriot*, (1896) A. C. 174. See *ante*, p. 341.

(*x*) *Whitely* v. *Edwards*, (1896) 2 Q. B. 48, C. A.

(*y*) Dan. Ch. Pr. 754.

(*z*) *Re Paragon Co.*, 8 Jur. N. S. 11.

(*a*) 1 & 2 Vict. c. 110, s. 15; Dan. Ch. Pr. 754.

(*b*) *Re Tillott, Lee* v. *Wilson*, (1892) 1 Ch. 86.

(*c*) *Mitchell* v. *De Vesey*, 67 L. T. 53.

(*d*) *Morris* v. *Manesty*, 7 Q. B. 674.

pay the costs both of that order and of the application to discharge it (*e*).

Order absolute.

The application for an order absolute is made to a master in the King's Bench Division, or to a registrar of the Probate Division (*f*).

The judge has a discretion as to granting a charging order, which, if properly exercised, will not be interfered with by the Court of Appeal (*g*).

A charging order, when made absolute, operates from the making of the order *nisi* (*h*), and an administration decree in the interval will not affect it (*i*).

A charging order absolute cannot be made if the defendant was dead when the order *nisi* was made (*k*).

Stop orders in aid of charging orders.

The Court has power to make a stop order as auxiliary to a charging order under the above Act; and formerly, where the fund was in Court, it was the common practice for the Courts to give effect to a charging order by means of a stop order (*l*).

Now, however, under the Supreme Court Funds Rules, 1905, r. 99, notice to the Paymaster is sufficient. After a charging order *nisi* has been made, and notice has thereby been given to the Paymaster, a stop order would be a merely useless piece of machinery, and is no longer necessary (*m*). Such notice will of itself give priority to the charging order over any subsequent orders affecting the fund (*n*).

Discharge of order.

The proviso at the end of sect. 15 of the stat. 1 & 2 Vict. c. 110, giving power to a judge to discharge or vary a charging order, applies only to orders *nisi*, and not to an order which has become absolute (*o*).

By the same section, it is provided that an order *nisi* shall be made absolute, unless sufficient cause to the contrary is shown. Where an order has been obtained charging a debtor's equitable interest in stock standing in the names of trustees, the

(*e*) *Stanley* v. *Bond*, 8 Beav. 50.
(*f*) R. S. C., Ord. LIV. r. 12.
(*g*) *Wicks* v. *Shanks*, 67 L. T. 609, C. A.
(*h*) *Haly* v. *Barry*, L. R. 3 Ch. 452; *Brereton* v. *Edwards*, 21 Q. B. D. 488, C. A.
(*i*) *Ibid.* See *Scott* v. *Lord Hastings*, 4 K. & J. 633.
(*k*) *Finney* v. *Hinde*, 4 Q. B. D. 102; *Stewart* v. *Rhodes*, (1900) 1 Ch. 386, C. A.
(*l*) *Reece* v. *Taylor*, 5 De G. & S. 480.
(*m*) Per Lord Esher, M.R., in *Brereton* v. *Edwards*, 21 Q. B. D. 488, at p. 496, C. A.
(*n*) *Ibid.* at p. 497.
(*o*) *Jeffryes* v. *Reynolds*, 52 L. J. Q. B. 55; *Drew* v. *Willis*, (1891) 1 Q. B. 450, C. A. See *Bright* v. *Sellar*, (1904) 1 K. B. 6.

Court will not interfere to discharge the judge's order, if the determination of the debtor's interest in the stock depends on the question of his insolvency (*p*); nor if it is a matter of equitable construction whether the debtor has an interest in the stock (*q*). But if the property charged is clearly not within reach of the Act, the Court will set the charging order aside (*r*).

Meaning of "company" and "stock."

By Ord. XLVI. r. 3, it is declared that the expression "company" therein includes the Governor and Company of the Bank of England and any other public company, whether incorporated or not, and the expression "stock" includes shares, securities, and dividends thereon.

Where a lien on shares standing in the name of a debtor was claimed by the company, a charging order was refused by the common law judge, but was obtained in equity subject to the lien (*s*)

Charging order on money.

Sect. 14 of the stat. 1 & 2 Vict. c. 110 does not extend to "money." But in aid of the power given by sect. 12 of that Act to take money under a *fi. fa.*, a charging order may be made by a judge of the King's Bench Division on cash standing to the credit of the debtor in the Chancery Division (*t*).

Debentures.

The expression "stock or shares" in sect. 14 does not include the debentures of a company (*u*).

Annuities.

A Government annuity to which the debtor is entitled as executor and legatee is not within the Act (*x*).

Suitors' fund.

It is doubtful whether an annuity payable out of the suitors' fund can be charged under these Acts, there being no specific stock, but only a fluctuating fund charged; the Court, however, in one case allowed the order to stand *quantum valeat* (*y*).

Pension.

A pension granted by the East India Company cannot be so charged (*z*).

Unascertained fund.

An unascertained share of residue, subject to the payment of debts, which is not in Court, cannot be so charged (*a*).

Contingent interest in shares.

A contingent equitable interest in shares may be so

(*p*) *Rogers* v. *Holloway*, 5 Man. & Gr. 292.

(*q*) *Fowler* v. *Churchill*, 11 M. & W. 57.

(*r*) *Morris* v. *Manesty*, 7 Q. B. 674; *Lomas* v. *Graves*, (1904) 2 K. B. 557.

(*s*) *Re Royal Bank of Australia*, 25 L. J. Ch. 649.

(*t*) *Brereton* v. *Edwards*, 21 Q. B. D. 488, C. A.

(*u*) *Sellar* v. *Bright*, (1904) 2 K. B. 446.

(*x*) *Taylor* v. *Turnbull*, 4 H. & N. 495.

(*y*) *Witham* v. *Lynch*, 1 Exch. 391.

(*z*) *Morris* v. *Manesty*, 7 Q. B. 674.

(*a*) *Re Anglesey, Galve* v. *Gardner*, (1903) 2 Ch. 727.

charged (*b*), but not an interest in the proceeds of the sale of shares by trustees under a will for payment of debts and ultimately for the debtor (*c*); and where the charging order would not be effectual, as the stock stood in the names of trustees for others, a bill by the judgment creditor to set aside a voluntary settlement of the stock was allowed without obtaining a charging order (*d*).

Debtor must have beneficial interest in shares charged.

A charging order will not affect stocks or shares standing in the name of the debtor if it is shown that he is merely a trustee having no beneficial interest therein in his own right (*e*), or if he is merely registered as owner for the purpose of qualifying as director (*f*).

Beneficial interest only is charged.

The debtor must have a beneficial interest at the date of the order *nisi;* for if, between the obtaining the judgment and the order *nisi*, the debtor dies or assigns his interest, the order *nisi* will be inoperative, even in the case of an equitable interest of which no notice has been given to the trustee of the assignment (*g*).

Priority.

The charging order only affects the interest which the debtor has in the funds, and not prior incumbrances, similarly to the operation of the charge upon real estate under sect. 13 (*h*), and under no circumstances can a charging order have priority over previous equitable incumbrances (*i*): thus a mortgage of an equitable interest in stock, of which no notice was given to the trustees, would be preferred to the charging order (*k*).

Where stock stands in the name of a trustee for the defendant and others, the defendant's interest is charged; it does not seem clear whether the charging order attaches where the interest of the debtor is to go over if he charges it; but where

(*b*) *Baker* v. *Tynte*, 2 E. & E. 897; *Cragg* v. *Taylor*, L. R. 1 Ex. 148; *S. C.*, L. R. 2 Ex. 131; *Bolland* v. *Young*, (1904) 2 K. B. 824.

(*c*) *Dixon* v. *Wrench*, L. R. 4 Ex. 154. *Qu.* whether this is now law. See *Ideal Bedding Co.* v. *Holland*, (1907) 2 Ch. 157.

(*d*) *Goldsmith* v. *Russell*, 5 De G. M. & G. 547.

(*e*) *Re Blakeley Ordnance Co.*, 25 W. R. 111; *Cooper* v. *Griffin*, (1892) 1 Q. B. 740, C. A.; *Howard* v. *Sadler*, (1893) 1 Q. B. 1; *Gray* v. *Stone*, 69 L. T. 282.

(*f*) *Cooper* v. *Griffin*, *sup.*; *Howard* v. *Sadler*, *sup.*

(*g*) *Scott* v. *Lord Hastings*, 4 K. & J. 633; cf. *Haly* v. *Barry*, L. R. 3 Ch. 452; *Stewart* v. *Rhodes*, (1900) 1 Ch. 386, C. A.

(*h*) *Hulkes* v. *Day*, 10 Sim. 41; *Fowler* v. *Churchill*, 11 M. & W. 57; and *inf.* p. 1385.

(*i*) *Eyre* v. *McDowell*, 9 H. L. C. 619, 626, 642; *Stronge* v. *Hawkes*, 4 De G. & J. 632; *Re Bell, Carter* v. *Stadden*, 54 L. T. 370; *Re Anglesey*, (1903) 2 Ch. 727.

(*k*) *Beavan* v. *Lord Oxford*, 6 De G. M. & G. 492, 524, 525, 532; *Pickering* v. *Ilfracombe Rail. Co.*, L. R. 3 C. P. 250; *Crow* v. *Robinson*, L. R. 3 C. P. 264, 267.

a dividend has already accrued, that is charged, notwithstanding the gift over (*l*).

Debt must be enforceable.

As a charging order has no greater effect than a charge executed by the judgment debtor, a charging order on a judgment by default for a debt which was incapable of being enforced will be inoperative (*m*).

Nature of charge created by order.

A charging order under this statute has been held to create such an incumbrance as will forfeit a life estate determinable on alienation (*n*); or if the tenant for life should "do or suffer any act" whereby the dividends should become payable to any other person (*o*).

A charging order *nisi* is not "an execution against the goods of a debtor" within sect. 45 of the Bankruptcy Act, 1883 (*p*). Nor is it a "transaction" protected by sect. 49 of that Act (*q*).

Payment of dividends on fund charged.

Notwithstanding the charging order, where the fund is not in Court, the Bank of England is bound to pay the dividends to the parties having the legal estate in the funds (*r*); and to transfer the stock at the direction of the legal owner, though the judgment creditor may protect his rights by giving notice to the trustee or by issuing a notice in lieu of distringas (*s*). The same, of course, applies to other public companies.

If a bank, with notice of a charging order on its shares, pays other judgment creditors, it will be responsible (*t*).

Trustees' costs.

A charging order upon funds in the hands of trustees does not affect the right of the trustees to their costs (*u*).

Creditor may take further proceedings within six months.

Within the period of six months prescribed by sect. 14 of the stat. 1 & 2 Vict. c. 110, the judgment creditor may take such proceedings as may be necessary to protect his interests. And he may, accordingly, it seems, bring an action to protect

(*l*) *South Western Loan, &c. Co.* v. *Robertson*, 8 Q. B. D. 17. See *Ideal Bedding Co.* v. *Holland*, (1907) 2 Ch. 157.

(*m*) *Re Onslow's Trusts*, L. R. 20 Eq. 677; *Stanley* v. *Stanley*, 7 Ch. D. 589.

(*n*) *Montefiore* v. *Behrens*, L. R. 1 Eq. 171.

(*o*) *Roffey* v. *Bent*, L. R. 3 Eq. 759. See *South Western Loan Co.* v. *Robertson*, 8 Q. B. D. 17.

(*p*) 46 & 47 Vict. c. 52. See *Re Hutchinson, Exp. Hutchinson*, 16 Q. B. D. 515.

(*q*) *Re O'Shea's Settlement, Courage* v. *O'Shea*, (1895) 1 Ch. 325, C. A.; *Wild* v. *Southwood*, (1897) 1 Q. B. 317.

(*r*) *Churchill* v. *Bank of England*, 11 M. & W. 325; *Fowler* v. *Churchill*, 11 M. & W. 57.

(*s*) *Adam* v. *Bank of England*, 52 Sol. J. 682.

(*t*) *Salaman* v. *Donovan*, 10 Ir. Com. L. R. App. 13.

(*u*) *Smith* v. *Yonde*, 2 F. & F. 376.

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his interest within the six months (*x*). The Court will not, however, on a mere petition by a judgment creditor who has obtained a charging order on a fund in Court belonging to the debtor, order payment of the fund without the debtor's consent (*y*).

In this interval, the receipt of dividends on stock has been restrained (*z*); but notice to the Paymaster would seem now to be sufficient (*a*).

Sale.

A sale cannot be ordered summarily in the original action; the charging order can only be enforced in a separate action or proceedings (*b*).

Section II.

Crown Debts.

i.—Crown Debts as affecting Mortgages of Land.—A mortgagee is liable to have his security postponed to certain claims of the Crown, which, by virtue of its prerogative, has the right to issue an "extent" or execution against all the lands of its debtors, except copyholds, and to follow such lands into the hands of subsequent mortgagees or purchasers, though without notice (*c*).

Prior equities.

The Crown, claiming under an extent, is, like a judgment creditor, subject to prior equities, and to such incumbrances as the debtor has lawfully created (*d*).

An equitable mortgage by deposit of title deeds made before the lien of the Crown has attached is binding upon the Crown (*e*); and the better opinion seems to be that the circumstance of the Crown obtaining possession of the legal estate under an extent could not affect any equitable charge which

(*x*) *Bristed* v. *Wilkins*, 3 Ha. 239.
(*y*) *Whitfield* v. *Prickett*, 13 Sim. 259.
(*z*) *Watts* v. *Jeffereyes*, 3 Mac. & G. 372; *Bristed* v. *Wilkins*, 3 Ha. 235; *Horsley* v. *Cox*, L. R. 4 Ch. 94, n.
(*a*) *Sup.* p. 1382.
(*b*) *Leggott* v. *Western*, 12 Q. B. D. 287; *Kolchmann* v. *Meurice*, (1903) 1 K. B. 534, C. A.
(*c*) 33 Hen. VIII. c. 39, ss. 75, 80. See further, as to Crown debts, Coote on Mortgages (5th ed.), vol. i. 178—193; Elphinstone and Clark on Searches, Ch. VII.
(*d*) *Casberd* v. *Ward*, 6 Pri. 411; *Rex* v. *Lee*, 6 Pri. 369; *Giles* v. *Grover*, 1 Cl. & F. 72.
(*e*) *Casberd* v. *Ward*, *sup.*

is created by the debtor before the lien of the Crown has attached (*f*).

So, also, an equitable mortgage of renewable leaseholds by deposit of title deeds is entitled to preference over a subsequent lien of the Crown, in respect of the renewed, as well as of the original, lease, although the Crown debt may have accrued before the date of the renewal (*g*). Not only all interests actually created by the debtor before the lien of the Crown has attached, but also the conditions to which the lands have been subjected prior to the date of such lien, are binding upon the Crown (*h*).

The prior security will not prevail against the Crown, if it were made in favour of a person in whom it was a breach of duty to the Crown to take it; as where it was taken by a receiver-general from a person immediately responsible to him in respect of moneys due to the Crown. And it seems that in such a case it would be the same if the mortgage were legal (*i*).

When the claim of the Crown attaches.

The charge of the Crown against its debtor's land will attach as from the time of his becoming in debt to the Crown (*k*). But by several successive statutes, protection has been afforded to mortgagees and purchasers of lands belonging to persons who may be accountable to the Crown, or persons deriving title from them, by providing that, unless the formalities prescribed by those statutes are complied with, the claim of the Crown shall not affect the lands in the hands of a mortgagee or purchaser.

ii.—Registration of Crown Debts.—Formerly, on a mortgage of real estate the Common Pleas Office had to be searched for Crown debts and acceptances of office, as well as for other incumbrances (*l*).

The provisions as to registry (*l*), and re-registry every five years (*m*), were in 1859 made obligatory on the Crown so as to bind the lands of a debtor as against a purchaser or mortgagee (*n*).

Crown Suits Act, 1865.

The rights enjoyed by the Crown were subsequently made

(*f*) *Burgess* v. *Wheate*, 1 Ed. 177; *Hodge* v. *Att.-Gen.*, 3 Y. & C. Ex. 342.
(*g*) *Fector* v. *Philpott*, 12 Pri. 197.
(*h*) *Rex* v. *Topping*, 1 McCl. & Y. 544.
(*i*) *Broughton* v. *Davies*, 1 Pri. 216.
(*k*) 13 Eliz. c. 4.
(*l*) 2 & 3 Vict. c. 11, s. 8.
(*m*) 18 & 19 Vict. c. 15, s. 6.
(*n*) 22 & 23 Vict. c. 35, s. 22.

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subject to the provisions of the Crown Suits Act, 1865 (*o*), under which future Crown debts did not affect land as against *bonâ fide* purchasers or mortgagees until a writ of execution was issued and registered; but except by an order of the Court no registration can now be made under the Act (*p*).

The Land Charges Registration and Searches Act, 1888, did not affect the Crown.

But by the Land Charges Act, 1900, a judgment or recognizance obtained or entered into on behalf of the Crown does not operate as a charge on land or on unpaid purchase-money until a writ or order enforcing it is registered under the Land Charges Registration and Searches Act, 1888. And this provision applies to any inquisition finding a debt due to the Crown, and any obligation or specialty made to the Crown, and any acceptance of office under the Crown whatever may have been its date in like manner as it applies to a judgment (*q*). Sect. 6 of the Land Charges Registration and Searches Act, 1888, also applies to every writ and order affecting land issued for the purpose of enforcing a judgment obtained on behalf of the Crown (*r*).

County registries.

The Registry Act for Middlesex expressly excepts from its operation all such judgments, statutes, and recognizances as are entered in the name and upon the proper account of his Majesty, his heirs, and successors (*s*). The Yorkshire Registry Acts do not contain any such exception (*t*).

Ireland.

The Land Charges Act, 1900, does not extend to Ireland, and the Acts affecting the registration and re-registration of Crown debts in Ireland are similar to those in force in England prior to the Land Charges Act, 1900.

(*o*) 28 & 29 Vict. c. 104, ss. 48, 49, repealed by 63 & 64 Vict. c. 26.
(*p*) 63 & 64 Vict. c. 26, s. 2 (3).
(*q*) 63 & 64 Vict. c. 26, s. 2 (1) (2); *ante*, p. 1375.
(*r*) *Ibid.* s. 3.
(*s*) 7 Anne, c. 20.
(*t*) 47 & 48 Vict. c. 54; 48 & 49 Vict. c. 26.

Section III.

Statutory Land Charges.

i.—Generally.—Statutes have from time to time been passed authorizing the inheritance of land to be charged not only by owners of the fee, but also by or on behalf of limited owners of settled lands and other persons not having absolute power of disposal in respect of their lands or being under disability.

Search for land charges.

Inquiries and searches for such statutory charges must, therefore, often form one of the precautions to be taken by a mortgagee before completion; but subsisting mortgages are expressly, by statute, postponed to many of such charges though subsequently effected.

Registration of land charges.

The Land Charges Registration and Searches Act, 1888 (*u*), as we have already seen (*x*), requires the registration in the Office of Land Registry of land charges created after the 31st of December, 1888, and by sect. 12 of that Act, land charges created after the commencement of that Act are void as against a mortgagee or purchaser for value unless registered.

The expression "land charge" is thus defined for the purposes of the Act by sect. 4 thereof:—

> "'Land charge' means a rent or annuity or principal moneys payable by instalments, or otherwise, with or without interest charged, otherwise than by deed, upon land, under the provisions of any Act of Parliament, for securing to any person either the moneys spent by him or the costs, charges, and expenses incurred by him under such Act, or the moneys advanced by him for repaying the moneys spent, or the costs, charges, and expenses incurred by another person under the authority of an Act of Parliament, and a charge under the thirty-fifth section of the Land Drainage Act, 1861, or under the twenty-ninth section of the Agricultural Holdings (England) Act, 1883 (*y*), but does not include a rate or scot."

"Land charge" does not include charges created *in invitum*, for example under the Public Health Act, 1875, s. 257 (*z*).

By the Land Charges Act, 1900, as we have already seen (*a*),

(*u*) 51 & 52 Vict. c. 51.
(*x*) *Ante*, p. 1374.
(*y*) Or under sect. 31; see Tenants' Compensation Act, 1890, s. 3.
(*z*) *Reg.* v. *Land Registry*, 24 Q. B. D. 178.
(*a*) *Ante*, p. 1375.

a judgment will not operate as a charge on land until a writ or order enforcing it is registered.

ii. **Charges for Commutation and Redemption of Tithes.**—By the Tithe Commutation Acts (*b*) power is given to the owners of particular estates in land or tithe rentcharge, and also to corporations sole and aggregate, to charge their proportion of the commutation expenses with interest at 4 per cent. on the land or tithe rentcharge respectively, to be paid off by twenty equal annual instalments; and a like power is given to owners of a partial estate in land to charge the expense of redeeming a tithe rentcharge under that Act upon the land for twenty years with interest (*c*).

By 2 & 3 Vict. c. 62, ecclesiastical corporations aggregate and collegiate bodies are enabled to charge the commutation expenses, with interest, on any other lands held to the like uses as those included in the commutation, to be paid off in like manner as before mentioned (*d*).

iii. **Charges for Enfranchisement of Copyholds.**—By the Copyhold Act, 1894, ss. 8, 15 (*e*), it is provided that compensation for enfranchisement may, in certain cases, be a rentcharge charged on and issuing out of the lands enfranchised. Sect. 27 provides for payment of rentcharges under the Act, and enacts as follows:—"The rentcharge shall be a first charge on the land charged therewith, and shall have priority over all incumbrances affecting the land except tithe rentcharge, and any charge having priority by statute notwithstanding those incumbrances are prior in date." By the same section, the remedies for the recovery of the rentcharge are by distress and entry in manner provided by the Conveyancing Act, 1881 (*f*). Sects. 28 to 31 provide respectively for the apportionment of rentcharges; for the protection of lessees from liability thereto;

(*b*) See 6 & 7 Will. IV. c. 71, ss. 77, 78; 2 & 3 Vict. c. 62, ss. 16, 17; 3 & 4 Vict. c. 15, s. 23. And see 5 & 6 Vict. c. 54, s. 8; 9 & 10 Vict. c. 73; 10 & 11 Vict. c. 104; 14 & 15 Vict. c. 53; 23 & 24 Vict. c. 93.

(*c*) 9 & 10 Vict. c. 73, s. 11. As to fees on redemption of rentcharges under the Tithes Acts, 1833 to 1891, see Order of Board of Agriculture of 10 Aug. 1901.

(*d*) Sect. 17.

(*e*) 57 & 58 Vict. c. 46, re-enacting the provisions of the earlier Copyhold Acts which are repealed.

(*f*) 44 & 45 Vict. c. 41, s. 44, see *ante*, p. 39. The remedies given by the Act of 1894 do not preclude the owner of the rentcharge from enforcing any other remedies. See *Searle* v. *Cooke*, 43 Ch. D. 519, C. A.

and for the redemption and sale of rentcharges created under the Act.

iv.—Land Improvement and Drainage Charges. By the Permanent Improvement Act, 1845 (*g*), s. 3, any tenant for life or *pur autre vie*, tenant by the curtesy, tenant for years determinable on any life or lives (if an infant, idiot, lunatic, or *feme covert*, by his or her guardian, next friend, committee, or husband, respectively), or any trustees for any charitable or other purposes, or any aggregate or sole corporation, or any mortgagee or incumbrancer in fee in possession, or any person entitled in fee to the equity of redemption and in possession of the land mortgaged, may by summons in the Chancery Division obtain leave to make any permanent improvements in the land by way of draining, and to charge the money so expended on the inheritance.

This Act does not require charges made thereunder to be registered.

Under the General Land Drainage Act, 1849 (*h*), the absolute order of the Board of Agriculture confers on the company a charge overriding earlier incumbrances (*i*).

The Improvement of Land Act, 1864 (*k*), ss. 49—71, contains provisions with regard to charges for improvements under the Act, whereby the Board of Agriculture (*l*), on completion of the works, are to charge the inheritance of the lands improved with the costs and expenses of the improvement; the charge is to be by way of rentcharge for a term of years, payable half-yearly, in reduction of principal and interest, and is to be according to the form prescribed in Schedule B. of the Act. Such charges are to have priority over all existing and future charges and incumbrances, except quit-rent, Crown rents, chief rents, and other charges incident to tenure, tithe commutation rentcharges, and statutory improvement charges. Charges under this Act are personal property, but may be merged, if the holder so desire, in the land charged.

The provisions of this Act are, by the Limited Owners' Residences Acts, 1870 and 1871 (*m*), extended so as to enable

(*g*) 8 & 9 Vict. c. 56.
(*h*) 12 & 13 Vict. c. xci.
(*i*) *General Land Drainage Co.* v. *United Counties Bank*, 103 L. T. 418.
(*k*) 27 & 28 Vict. c. 114. See 45 & 46 Vict. c. 38, s. 30, and schedule.
(*l*) 52 & 53 Vict. c. 30.
(*m*) 33 & 34 Vict. c. 56; 34 & 35 Vict. c. 84.

limited owners, with the consent of the Board of Agriculture, to charge in like manner the inheritance of their lands with the expenses of building residences, &c.

The Act of 1864 is further extended by the Settled Land Act, 1882, s. 30, so as to include all the improvements in the latter Act; and the mode of procedure under the Act of 1864 is also simplified by sect. 64.

The Improvement of Land Act, 1899 (*n*), makes provision for the repayment of the rentcharge, and extends the remedies provided by the Conveyancing Act, 1881, s. 44, to such rentcharge; it also provides that, except under an order of the Court, no entry or search is to be made in any register of land improvement orders kept under sects. 56 and 69 of the Act of 1864.

A rentcharge created under the Act of 1864 is an "incumbrance" within the meaning of sect. 5 of the Settled Land Act, 1882 (*o*).

A mortgage created under a term for raising money in aid of the personal estate is an "incumbrance affecting the land charged" within the meaning of the Limited Owners' Residences Act, 1870, s. 9, and has priority over a rentcharge created by the tenant for life (*p*).

Section IV.

Liens.

i.—Lien of Vendor for unpaid Purchase-money.—If a vendor (*q*) convey his estate to the purchaser, and the purchase-money or part thereof remains unpaid, the vendor has, by an implied contract between him and the purchaser, a lien on the estate for the amount of the money.

(*n*) 62 & 63 Vict. c. 46.

(*o*) *Re Strafford and Maples*, (1896) 1 Ch. 235.

(*p*) *Provident Clerks' Mutual Life Ass.* v. *Law Life Ass.*, W. N. (1897) 73.

(*q*) The question of the lien of vendors and purchasers, and other liens, is here considered only with reference to priorities as between them and mortgages. The detailed consideration of the nature and extent of liens would be foreign to the scope of the present treatise.

A mortgagee, reconveying without being paid off, or being paid by bills that are dishonoured, has a similar lien, it seems, to that of a vendor (*r*).

Re-conveyance by mortgagee before payment.

When a conveyance passing the legal estate is executed, the lien is postponed to a subsequent mortgagee from the purchaser without notice (*s*).

Priority as between lien and subsequent mortgage.

The lien of a vendor for unpaid purchase-money was postponed to an equitable deposit of the title deeds by the purchaser, on the ground that the vendor, by parting with the deeds, has put it into the power of the purchaser to deal with the estate as absolute owner (*t*).

Lien postponed to subsequent mortgage by deposit.

Now, by sect. 55 of the Conveyancing Act, 1881, a receipt for consideration money in the body of a deed is, in favour of a purchaser without notice, sufficient evidence of payment of the money; and accordingly where a trustee for sale, acting within the scope of his authority, sold property and executed the conveyance, but parted with the deed without receiving the purchase-money, it was held that a subsequent mortgagee by deposit of the conveyance without notice had priority over the lien of the trustee or his *cestuis que trust* (*u*). But the case is different where the sale is made in breach of trust, and in that case the equity of the beneficiaries prevails (*x*).

Lien of trustee vendor.

Generally, however, if, by reason of the legal estate being outstanding or otherwise, the purchaser gives a mere equitable charge on the property before payment of the purchase-money, then, the equities being equal, the rule "*qui prior est tempore, potior est jure*" applies, and the vendor's lien will prevail over the charge of the equitable incumbrancer, though without notice (*y*). In the case referred to, it would seem that the equitable mortgagee had not the title deeds (*z*), but this fact cannot with certainty be collected from the report.

Lien not generally postponed to mere equitable charge.

The lien will bind the lands in the hands of the party himself and his heirs, and also of volunteers, and *bonâ fide* purchasers

Lien binds assignees with notice.

(*r*) *Teed* v. *Carruthers*, 2 Y. & C. C. C. 31.

(*s*) *Smith* v. *Evans*, 28 Beav. 59.

(*t*) *Rice* v. *Rice*, 2 Drew. 73; *Rimmer* v. *Webster*, (1902) 2 Ch. 163. See *Stanhope* v. *Earl Verney*, Butler's note, 1 Co. Lit. 290 b xv.

(*u*) *Lloyd's Banking Co.* v. *Bullock*, (1896) 2 Ch. 192. *Secus*, if the trustee had sold without authority, see *ante*, p. 1328.

(*x*) *Capell* v. *Winter*, (1907) 2 Ch. 376.

(*y*) *Mackreth* v. *Symmons*, 15 Ves. 328, 350.

(*z*) See Sug. V. & P. (14th ed.) 682. And see *Rice* v. *Rice*, 2 Drew. 73 at p. 82.

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with notice claiming under him (*a*). And the vendor's lien will, if the deed of conveyance be retained by him, prevail against a mortgagee or purchaser from the vendee with a legal conveyance, who neglects to inquire after the deed (*b*). If the land is in a registry county, the vendor is not bound to have an agreement in writing registered (*c*). But if the land is in a compulsory registration district, the only safe course is to register the vendor's lien in all cases.

Lien on machinery.

A vendor's lien for unpaid purchase-money has been held to extend to trade machinery affixed to the freehold, and as there was nothing which could be registered, the Bills of Sale Acts did not apply, so as to deprive the lien of its validity or priority for want of registration (*d*). But a lien or charge over goods given on terms embodied in a written agreement is within the mischief of the Acts (*e*).

Enforcement of vendor's lien.

It seems that the only way to enforce a vendor's lien is to apply to the Court for a declaration of charge and an order for sale (*f*). But where the land is found to be unsaleable, the vendor's lien may be enforced by restraining the purchaser from continuing in possession of the land (*g*).

Parol assignment of lien.

A mere parol assignment of his lien for value, by the vendor to a third person, seems to be effectual. So if, at the time of the purchase, it be agreed by parol between the vendor and purchaser and a third person that such third person shall have the benefit of such lien, and the title deeds are at the same time deposited with, or are then in the possession of such third person, the latter can enforce the lien (*h*).

Subrogation.

If one advance money in payment for land which another is under contract to buy, he is entitled by subrogation to the same lien which the vendor would have had if the price had remained unpaid (*i*). Thus, where an undischarged bankrupt bought

(*a*) *Mackreth* v. *Symmons*, 15 Ves. 328, 337; *Walker* v. *Preswick*, 2 Ves. Sen. 622; *Elliot* v. *Edwards*, 3 B. & P. 183; *Gibbons* v. *Braddall*, 2 Eq. Ca. Abr. 682 D; *Davies* v. *Thomas*, 2 Y. & C. Ex. 234.

(*b*) *Worthington* v. *Morgan*, 16 Sim. 547; *Oliver* v. *Hinton*, (1899) 2 Ch. 264.

(*c*) *Kettlewell* v. *Watson*, 26 Ch. D. 501, C. A.

(*d*) *Re Vulcan Ironworks Co.*, W. N. (1888) 37.

(*e*) *Coburn* v. *Collins*, 35 Ch. D. 373. See remarks on this case in *McEntire* v. *Crossley*, (1895) A. C. 457.

(*f*) Seton (7th ed.), 2220.

(*g*) *Allgood* v. *Merrybent and Darlington Rail. Co.*, 33 Ch. D. 571.

(*h*) *Dryden* v. *Frost*, 3 My. & Cr. 670.

(*i*) *Nottingham, &c.* v. *Thurstan*, (1903) A. C. 6. And see (1895) A. C. 182.

land and his solicitor paid part of the purchase-money, the solicitor had a lien for the amount so paid in priority to the claims of the trustee in bankruptcy (*k*). So, where a company purchased land and deposited the deeds with the person who advanced the purchase-money, the equitable mortgagee had priority over the debenture holders (*l*).

Discharge of vendor's lien by taking security.

A vendor's lien may be waived or discharged by clear evidence of the intention of the parties that the estate shall not be a security for the unpaid purchase-money, as if a charge on the purchased lands, or, apparently, on other lands of the purchaser is taken to secure the money; for it cannot have been intended that the vendor should have a double mortgage (*m*).

Personal security does not discharge lien.

The question in all the cases is whether the security given is a substitution for the purchase-money, and it becomes a question of intention and depends upon the circumstances of each case (*n*).

Notwithstanding old cases, it is settled that a mere personal security, whether a bond (*o*), bill of exchange (*p*), promissory note (*q*), or the like, without more (*r*), and whether negotiated or not (*s*), will not of itself be sufficient to remove the lien; nor is there any distinction on the point between freeholds and copyholds, the lien equally affecting each species of property (*t*). And the same would seem to apply to a covenant by the vendee for payment; at least, if the conveyance is not expressed to be made in consideration of the covenant (*u*).

Mortgage will discharge lien.

A mortgage of other lands for the whole or part of the purchase-money (*x*), or a mortgage of the purchased estate for part of the purchase-money, permitting the rest to remain on personal security (*y*), has been thought sufficient for the purpose

(*k*) *Bird* v. *Philpott*, (1900) 1 Ch. 822, following *Meux* v. *Smith*, 11 Sim. 410.

(*l*) *Re Connolly Bros.*, (1912) 2 Ch. 25.

(*m*) See *Nairn* v. *Prowse*, 6 Ves. 752.

(*n*) See (1892) A. C. 281.

(*o*) *Hearle* v. *Botelers*, Cary, 25. And see *Winter* v. *Lord Anson*, 3 Russ. 488; 31 Beav. 346.

(*p*) *Hughes* v. *Kearney*, 1 Sch. & L. 136; *Grant* v. *Mills*, 2 V. & B. 309; *Exp. Peake*, 1 Madd. 346; *Gunn* v. *Bolckow Vaughan*, L. R. 10 Ch. 492.

(*q*) *Gibbons* v. *Braddall*, 2 Eq. Ca. Abr. 682 D.

(*r*) *Mackreth* v. *Symmons*, 15 Ves. 337.

(*s*) *Exp. Learing*, 2 Rose, 79.

(*t*) *Winter* v. *Lord Anson*, 3 Russ. 488.

(*u*) See *Clarke* v. *Royle*, 3 Sim. 502; *Buckland* v. *Pocknell*, 13 Sim. 406.

(*x*) *Nairn* v. *Prowse*, 6 Ves. 752; *Eyre* v. *Sadlier*, 15 Ir. Ch. R. 1. But see as to the first point, per Lord Eldon in *Mackreth* v. *Symmons*, 15 Ves. 328 at p. 341; and *Saunders* v. *Leslie*, 2 Ba. & Be. 509.

(*y*) *Bond* v. *Kent*, 2 Vern. 281.

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of discharging the lien on the purchased estate, in the first instance wholly, and in the second instance to the amount of the money remaining on the personal security.

So a bond and mortgage of part of the estate have been held to exclude the lien of the vendor on the residue (*z*).

Where purchase is with trust money.

A fortiori, the vendor's lien will be discharged if he has notice of a trust affecting the purchase-money, and deals with the trustee-purchaser in a manner inconsistent with the duty of the latter (*a*). So, where the purchaser was a trustee, a loan by the vendor to the trustee of part of the purchase-money on deposit of the title deeds was held void, and the lien gone (*b*).

Sale for debentures, &c.

Where land was sold to a company in consideration of paid-up shares and debenture bonds of the company, the lien was excluded; no money was ever to be paid (*c*).

Lien and collateral securities not enforceable together.

The vendor cannot proceed to enforce his lien and his collateral securities at the same time (*d*), and he will be postponed to a mortgage of the estate made to secure a part of the purchase-money advanced by such mortgagee, if he is an assenting party to the mortgage (*e*).

Vendor's lien on personalty.

The doctrine of a vendor's lien applies not only to land and chattels real, but also to pure personal estate (*f*), and to a share of proceeds of sale of leasehold property bequeathed upon trust for sale at a future date (*g*).

The lien of the unpaid vendor of goods is now regulated by the Sale of Goods Act, 1893 (*h*).

ii.—**Lien of Purchaser on Rescission of Contract.**—If a purchaser advance all or any part of the money to the vendor, and the contract is broken off, an implied contract arises, by which the purchaser has a lien on the land (*i*); and if the purchaser properly declines to complete, he has a lien for the deposit and interest on unpaid purchase-money, and for interest on the payments (*k*), and also for the costs of a suit by himself or the

(*z*) *Capper* v. *Spottiswoode*, Taml. 21.

(*a*) See *White* v. *Wakefield*, 7 Sim. 401.

(*b*) *Muir* v. *Jolly*, 26 Beav. 143.

(*c*) *Re Brentwood Brick and Coal Co.*, 4 Ch. D. 562, C. A.

(*d*) *Nairn* v. *Prowse*, 6 Ves. 752; *Barker* v. *Smark*, 3 Beav. 64.

(*e*) *Bond* v. *Kent*, 2 Vern. 281; *Cood* v. *Pollard*, 9 Pri. 544; 10 Pri. 109.

(*f*) *Re Stucley*, (1906) 1 Ch. 67.

(*g*) *Davies* v. *Thomas*, (1900) 2 Ch. 462, C. A.

(*h*) 56 & 57 Vict. c. 71, ss. 39, 41—43, 47.

(*i*) See *Burgess* v. *Wheate*, 1 W. Bl. 123; *Lacon* v. *Mertins*, 3 Atk. 4; *Mackreth* v. *Symmons*, 15 Ves. 328, 337.

(*k*) *Rose* v. *Watson*, 10 H. L. C.

vendor to compel performance on the contract (*l*), and also, it seems, for the costs of investigating the title (*m*), and this lien attaches on the deeds (*n*). If the purchase goes off through the fault of the purchaser, of course he has no lien for what he has paid (*o*).

The above passage has been judicially approved as an accurate statement of the law (*p*). It may be added that the lien continues though the purchaser himself rescinds the contract under a clause enabling him to do so (*q*). And, though a purchaser may lose his right to enforce the contract, he may still have a lien for his deposit or instalments of purchase-money, if his conduct does not amount to a repudiation of the contract (*r*).

Re-sale by vendee.

And so, if the vendee has resold before completion, the sub-purchaser will have a lien for what he has paid upon the interest which the vendee had acquired by part payment of the purchase-money (*s*).

Lien of evicted purchaser on purchase-money.

If the purchaser, after paying his purchase-money, has been evicted, it seems that he has a lien on the purchase-money, if it can be ear-marked, against the vendor, but not against an assignee of the fund for valuable consideration without notice (*t*).

When the vendor is a mortgagee.

If the vendor, when the contract goes off after payment of the purchase-money, is a mortgagee, the lien of the purchaser will attach only upon the interest of the mortgagee (*u*); and if the mortgagee is trustee for others, the lien may affect their interests also (*u*). In one case the Court followed the purchase-money into the stock in which it had been invested by the vendor, and that notwithstanding a transfer to a third person (*x*). The case in question, however, was reversed on other grounds, and has been questioned (*y*).

672; *Wythes* v. *Lee*, 3 Drew. 396; *Turner* v. *Marriott*, L. R. 3 Eq. 744; *Aberaman Iron Works* v. *Wickens*, L. R. 4 Ch. 101; *Torrance* v. *Bolton*, L. R. 8 Ch. 118; *Re Stucley*, *sup.*

(*l*) *Middleton* v. *Magney*, 2 H. & M. 233; *Turner* v. *Marriott*, L. R. 3 Eq. 744.

(*m*) *Kitton* v. *Hewett*, W. N. (1904) 21.

(*n*) *Oxenham* v. *Esdaile*, 2 Y. & J. 493; 3 Y. & J. 262; *Esdaile* v. *Oxenham*, 3 B. & Cr. 225.

(*o*) *Dinn* v. *Grant*, 5 De G. & S. 451.

(*p*) *Whitbread* v. *Watt*, (1901) 1 Ch. 911, per Farwell, J.

(*q*) *S. C.*, (1902) 1 Ch. 835, C. A.

(*r*) *Levy* v. *Stogdon*, (1898) 1 Ch. 478; (1899) 1 Ch. 5; *Cornwall* v. *Henson*, (1899) 2 Ch. 710.

(*s*) *Aberaman Iron Works* v. *Wickens*, L. R. 4 Ch. 101.

(*t*) *Cator* v. *Earl of Pembroke*, 1 Bro. C. C. 301.

(*u*) *Wythes* v. *Lee*, 3 Drew. 396.

(*x*) *Small* v. *Attwood*, Yo. 507.

(*y*) Sug. V. & P. (14th ed.) 256.

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Deposit of deeds by vendor.

The equitable deposit of the title deeds by the vendor before completion generally attaches to the unpaid purchase-money (*z*); and the purchaser's right to have the property conveyed to him on payment of the purchase-money is paramount over the rights of the equitable mortgagee in respect of the land (*a*).

iii.—**Liens for Expenses of preserving, maintaining, or improving Property.**—It is a general principle that a lien cannot be acquired merely by the outlay of money upon the property of another by a person having no title to or interest in the property without a contract express or implied (*b*).

Partial repudiation of contract to expend money.

A man who enters into a contract to expend a certain sum of money on land, and, after spending part of it, declines to perform the contract, has no lien on the land for the money which he has expended (*c*).

No lien of joint owner against co-owners.

No lien belongs to a tenant in common against the share of his co-tenant for payments in respect of the estate (*d*). On the same ground it was held that one joint owner of a house has no lien for repairs and substantial improvements made by him out of his own moneys (*e*).

No lien for expenditure by stranger.

So, also, where the solicitor of an executrix out of his own moneys paid off a claim on the testator's estate, it was held that he did not thereby, as against creditors of the testator, acquire a lien on the estate or the title deeds for the sum so paid (*f*). And a guardian who paid off an incumbrance on an infant's estate was not entitled to a lien on the property (*g*).

So a person who lays out money on property, which he has bought without any title, has no lien on the estate as against the rightful owner, or those claiming under him (*h*).

Lien for expenditure by person having or claiming interest.

But a different rule prevails where a person who has laid out money on property of another *bonâ fide* believes himself to be entitled to or interested in the property. Thus a lien for improvements *bonâ fide* made by a person in wrongful posses-

(*z*) *Rayne* v. *Baker*, 1 Giff. 241.
(*a*) *Flinn* v. *Pountain*, W. N. (1889) 32.
(*b*) *Murray* v. *Pinkett*, 12 Cl. & F. 764; *Burridge* v. *Rowe*, 1 Y. & C. C. C. 183, 191; *Clack* v. *Holland*, 19 Beav. 277.
(*c*) *Wallis* v. *Smith*, 21 Ch. D. 245, C. A.
(*d*) *Exp. Young*, 2 V. & B. 242. See *Swan* v. *Swan*, 8 Pri. 518; *Leigh* v. *Dickeson*, 15 Q. B. D. 60, C. A.; and cf. *Kennedy* v. *De Trafford*, (1897) A. C. 180.
(*e*) *Kay* v. *Johnstone*, 21 Beav. 536.
(*f*) *Christian* v. *Field*, 2 Ha. 177.
(*g*) *Hooper* v. *Eyles*, 2 Vern. 479.
(*h*) *Ridgway* v. *Roberts*, 4 Ha. 106, 110.

sion, under the belief that he is the absolute owner, has been allowed (*i*); or by one in possession under a deed which is afterwards set aside for fraud or other good ground, or which is held to pass a redeemable interest (*k*); or by a purchaser in possession under a contract with the remainderman upon the faith of a promise by the tenant for life to concur, which he refused to do (*l*).

Lien for expenditure incurred in expectation of benefit.

On the same principle, a person will be allowed a lien for money expended on property of another, where the owner has held out to him a representation that he will enjoy the benefit of his expenditure. So a tenant in possession under a contract for a lease which goes off for want of title, has a lien for his outlay (*m*), but not where the tenant rejects the lease (*n*). So where sons were allowed by their father, the owner of a granary, to expend moneys on it for their business (*o*); otherwise, where there was an implied contract by a son-in-law occupying a house rent free to keep the premises in repair (*p*).

Lien of tenant for life.

As a general rule, a tenant for life has no lien upon the estate for the moneys expended by him in substantial improvements (*q*), unless done in conformity with a statute (*r*). But, under special circumstances, a tenant for life has been allowed a lien for repairs and improvements (*s*).

Where a tenant for life paid off a mortgage and took an assignment, and made improvements upon the mortgage premises, he was allowed no lien for those made before the assignment of the mortgage, but he was allowed two-thirds of those made after, but not the other third, as he had the benefit during his life; and no interest on the value of the improvements was allowed during his life, as a tenant for life must keep down the interest (*t*).

(*i*) *Neesom* v. *Clarkson*, 4 Ha. 97; *Thorne* v. *Newman*, Finch, 38. See *Swan* v. *Swan*, 8 Pri. 518.

(*k*) *Mulhallen* v. *Marum*, 3 Dr. & War. 317, 337; *Fee* v. *Cobine*, 11 Ir. Eq. R. 406; *Mill* v. *Hill*, 3 H. L. C. 829.

(*l*) *Ludlow* v. *Grayall*, 11 Pri. 58.

(*m*) *Middleton* v. *Magney*, 2 H. & M. 233.

(*n*) *Exp. Ladd*, 3 D. & C. 647.

(*o*) *Unity Bank* v. *King*, 25 Beav. 72; 4 Jur. N. S. 470.

(*p*) *Millard* v. *Harvey*, 34 Beav. 237.

(*q*) *Caldecott* v. *Brown*, 2 Ha. 144; *Nairn* v. *Majoribanks*, 3 Russ. 582. See *Sarshaw* v. *Gibbs*, Kay, 333; *Floyer* v. *Banks*, L. R. 8 Eq. 115; *Gilliland* v. *Crawford*, I. R. 4 Eq. 35; *Leigh's Estate*, L. R. 6 Ch. 887.

(*r*) *Exp. Davies*, 3 De G. & J. 144; 4 Jur. N. S. 1029.

(*s*) *Harris* v. *Poyner*, 1 Drew. 174; *Macnolty* v. *Fitzherbert*, 3 Jur. N. S. 1237; *Re Barrington's Settlement*, 1 J. & H. 142.

(*t*) *Newling* v. *Abbot*, Vin. Abr. Account (D. A.) 8, p. 125; 2 Eq. Ca. Abr. 596.

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Where a tenant for life of property who was also owner in fee of a moiety borrowed money on mortgage, which, with other money, was expended in permanent improvements, it was held that the value of the improvements, but not exceeding the amount of the mortgage, should be borne rateably by both moieties (*u*).

Lien of trustees.

All trustees have a lien on the trust estate for money properly expended thereon (*x*). They have a right of indemnity against, and thus a lien upon, the property of the trust, in priority over charges created by the *cestuis que trust*. Thus, trustees of a company have priority for any sums due to them in priority over debenture holders (*y*).

Similarly, directors of a company, who have advanced money for the purchase of an estate, have a lien, although the conveyance recited that the estate was purchased with the money of the company (*z*); and trustees have a lien under similar circumstances (*a*).

But if a trustee or guardian borrows money from a third person to pay off an incumbrance on the trust estate, the third person has no lien (*b*), though he is entitled to stand in the place of the trustee (*c*).

Trustees have no lien for expenses not authorized by the terms of their trust (*d*). But where trustees have power to carry on a business, they have a lien on the business for their expenses, and creditors of the business can stand in their place (*e*). Trustees who have incurred costs reasonably and *bonâ fide* in an action for protecting the trust property may retain such costs out of income until provision can be made for raising them out of the *corpus* (*f*).

The right of a trustee to be indemnified for expenditure in relation to the trust estate is strictly limited to that estate (*g*).

Salvage lien.

The maritime doctrine of salvage applies only to ships and

(*u*) *Re Jones, Farrington* v. *Forrester,* (1893) 2 Ch. 461.
(*x*) *Darke* v. *Williamson,* 25 Beav. 622.
(*y*) *Re Exhall, &c. Co.,* 35 Beav. 449; *Pooley Hall Coll. Co.,* 18 W. R. 201.
(*z*) *Re Imperial Salt, &c. Co.,* 2 W. R. 122.
(*a*) *Re Pumfrey,* 22 Ch. D. 255.
(*b*) *Hooper* v. *Eyles,* 2 Vern. 480.
(*c*) *Re Pumfrey, sup.*
(*d*) *Leedham* v. *Chawner,* 4 K. & J. 458. See *Malins* v. *Greenway,* 7 Ha. 391; *Strickland* v. *Symons,* 26 Ch. D. 245, C. A.
(*e*) *Re Johnson,* 15 Ch. D. 553. See *Exp. Garland,* 10 Ves. 110, 120; *Exp. Edmonds,* 4 De G. F. & J. 488, 498.
(*f*) *Stott* v. *Milne,* 25 Ch. D. 710, C. A.
(*g*) *Re Earl of Winchilsea's Policy Trusts,* 39 Ch. D. 168.

goods in peril at sea. No similar doctrine applies to things on land; and it seems doubtful whether, in the latter case, there is any lien for salvage apart from contract, express or implied (*h*).

A mortgagee, therefore, has no lien for salvage in respect of repairs to buildings or payment of premiums on a policy (*i*).

A lien or allowance is sometimes permitted on the ground of salvage for expenditure in preserving or protecting the property incurred by persons interested therein (*k*).

Payment of renewal fines, &c.

So, where a person having a partial interest in an estate pays renewal fines or the like, so as to preserve the property for the benefit of all persons interested, he will be allowed a lien on the estate (*l*).

Payment of premiums on policies.

So, also, where a person interested in a policy of insurance pays out of his own moneys premiums necessary to keep up the policy, he may, in some cases, be entitled to a lien as against other persons interested in the policy (*m*).

Rules laid down in *Re Leslie*.

It has, however, been laid down (*n*), that where a person who is not the sole beneficial owner of a policy of life assurance pays the premiums to keep up such policy, he is entitled to a lien on the property or its proceeds only in one or other of the following cases:—(1) By contract with a beneficial owner of the policy (*o*); (2) by reason of the right of trustees to an indemnity out of their trust property for money expended by them in its preservation (*p*); (3) by subrogation of this right of trustees of some person who may at their request have advanced money for the preservation of the property (*q*); (4) by reason of the right of mortgagees or other persons having a

(*h*) *Falcke* v. *Scottish Imperial Ins. Co.*, 34 Ch. D. 249, C. A. See *Re Willis*, (1902) 1 Ch. 15.

(*i*) *Landowners', &c. Drainage Co.* v. *Ashford*, 16 Ch. D. 411; *Burridge* v. *Rowe*, 1 Y. & C. C. C. 183; and see *Brooke* v. *Stone*, 34 L. J. Ch. 251; *White* v. *Metcalf*, (1903) 2 Ch. 567.

(*k*) See as to salvage with regard to ships, &c., *post*, p. 1416.

(*l*) *Manlove* v. *Bale*, 2 Vern. 84; *Lacon* v. *Mertins*, 3 Atk. 4; *Hamilton* v. *Denny*, 1 Ba. & Be. 199; *Jones* v. *Jones*, 5 Ha. 440 at p. 465; *Fetherstone* v. *Mitchell*, 9 Ir. Eq. Rep. 480.

(*m*) *Burridge* v. *Rowe*, 1 Y. & C. C. C. 183. See *West* v. *Reid*, 2 Ha. 249; *Gill* v. *Downing*, L. R. 17 Eq. 316.

(*n*) *Re Leslie, Leslie* v. *French*, 23 Ch. D. 552 at p. 560. See *Falcke* v. *Scottish, &c. Co.*, 34 Ch. D. 234; *Re Power*, (1899) 1 Ir. R. 6.

(*o*) *Aylwin* v. *Witty*, 30 L. J. Ch. 860.

(*p*) *Clack* v. *Holland*, 19 Beav. 262. See *Re Earl of Winchilsea's Policy Trusts*, 39 Ch. D. 168, *sup.* p. 1400.

(*q*) *Gill* v. *Downing*, L. R. 17 Eq. 316; *Todd* v. *Moorhouse*, L. R. 19 Eq. 69.

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charge on a policy to add to their charge any moneys which have been paid by them to preserve the property (*r*).

Payment of premiums by mortgagor.

In one case a lien was allowed on the ground of salvage as against a mortgagee, in favour of a mortgagor who had continued to pay the premiums on the mortgaged policy after his liability so to do had been determined by his bankruptcy (*s*).

Mortgagor has generally no lien against mortgagee.

As a general rule, however, a mortgagor having an equity of redemption, or an ultimate interest in an estate or fund, cannot create a charge or lien in his own favour, as against a mortgagee, in respect of expenses incurred in preserving or improving the property (*t*).

Where a builder mortgaged the benefit of a contract, which was voidable if the building should not be finished by a certain day, and afterwards executed a creditor's deed; the trustee of the deed, by arrangement with the owners of the land, completed the building out of his own moneys; it was held that the lien for the money so paid had priority over the mortgage (*u*). But such a lien was held not to prevail against a mortgagee who had not exercised his power of taking the work out of the original contractor's hands (*x*).

Lien of shipwright.

A shipwright has a lien on a ship for repairs so long as he remains in possession (*y*). In an action by the mortgagee of a ship, material men with a possessory lien intervened. The proceeds of sale of the ship not being sufficient to satisfy the interveners' claim, it was held that the mortgagee was entitled to his costs of action up to sale, in priority to the claims of the interveners (*z*).

Lien in case of mines, &c.

Special reason for allowing a lien on the ground of salvage occurs in the case of mines and works where, owing to their perishable nature, immediate expenditure for their preservation or protection from risk is a matter of urgency (*a*); and such a lien will be enforced against a mortgagee or trustee in bankruptcy (*b*).

(*r*) See *ante*, pp. 1223, 1224.

(*s*) *Shearman* v. *British Empire Insurance Co.*, L. R. 14 Eq. 4. But see *Saunders* v. *Dunman*, 7 Ch. D. 284.

(*t*) *Saunders* v. *Dunman*, 7 Ch. D. 284. See *Norris* v. *Caledonian Insurance Co.*, L. R. 8 Eq. 127.

(*u*) *Tooth* v. *Hallett*, L. R. 4 Ch. 242; *ante*, p. 193.

(*x*) *Drew & Co.* v. *Josolyne*, 18 Q. B. D. 590, C. A.

(*y*) *Franklin* v. *Hosier*, 4 B. & Ad. 341. See *Neptune*, 3 Knapp, 96; and see *post*, p. 1415.

(*z*) *Sherbro'*, 52 L. J. P. D. & A. 28.

(*a*) *Scott* v. *Nesbitt*, 14 Ves. 438; *Sayers* v. *Whitfield*, 1 Knapp, 133; *Burdon* v. *Barkas*, 2 Giff. 412.

(*b*) *Fereday* v. *Wightwick*, 1 R. & M. 115.

iv.—Lien for Breach of Trust.—Where trust moneys are invested upon improper securities, the persons interested have a lien on the securities into which they are traced (*c*). Similarly where they are invested in the purchase or improvement of land (*d*); and it is the same though the moneys be applied indirectly in repayment of the money borrowed for the immediate purchase-money (*e*).

Purchase with trust moneys.

Where an estate in settlement has been sold under the powers in the deed, and the tenant for life, having received the purchase-money, has invested it, together with money of his own, in other lands and taken the conveyance to himself in fee, the Courts will decree a lien on the estate so purchased to the amount of the trust money, although many years may have elapsed during which the tenant for life has held the property as his own (*f*).

Purchase by tenant for life in his own name.

If the tenant for life under a settlement fraudulently obtain possession of a part of the settled property, or a party to the settlement does not perform his part of the agreement, a lien is created to the amount of the abstraction or of the deficiency on any other property which the same party takes under the same or a corresponding settlement (*g*), even as against an assignee for valuable consideration (*h*).

Where a trustee has a beneficial interest under a will, and commits a breach of trust, the estate has a lien upon the interest of the trustee to make good the breach of trust (*i*), and if the trustee makes an equitable mortgage of his interest, the mortgage will be subject to the estate's lien (*k*); and the lien attaches upon a derivative interest of the trustee as next of kin of a *cestui que trust* (*l*); but the principle does not apply where the trustee holds a dry legal estate only (*m*), nor where the estate of the trustee sought to be impounded is a legal

Trustee having beneficial interest.

(*c*) *Mant* v. *Leith*, 15 Beav. 524; *Harford* v. *Lloyd*, 20 Beav. 310.

(*d*) *Lane* v. *Dighton*, Amb. 409; *Lewis* v. *Madocks*, 17 Ves. 57; *Williams* v. *Thomas*, 2 Dr. & S. 29; *Phayre* v. *Peree*, 3 Dow, 116; *Re Pumfrey*, 22 Ch. D. 255.

(*e*) *Hopper* v. *Conyers*, L. R. 2 Eq. 549.

(*f*) *Price* v. *Blakemore*, 6 Beav. 507; *Birds* v. *Askey*, 24 Beav. 618.

(*g*) *Smith* v. *Smith*, 1 Y. & C. Ex. 338; *Priddy* v. *Rose*, 3 Mer. 86; *Woodyatt* v. *Gresley*, 8 Sim. 180. And see *Burridge* v. *Rowe*, 8 Jur. 299; *Exp. Makins*, 2 M. D. & De G. 508.

(*h*) *Dibbs* v. *Goren*, 11 Beav. 483.

(*i*) *Cole* v. *Muddle*, 10 Ha. 186; *Clack* v. *Holland*, 19 Beav. 262; *Barnett* v. *Sheffield*, 1 De G. M. & G. 371; *Wilkins* v. *Sibley*, 4 Giff. 442.

(*k*) *Ibid.*; *Priddy* v. *Rose*, 3 Mer. 86.

(*l*) *Jacubs* v. *Rylance*, L. R. 17 Eq. 341.

(*m*) *British Mutual Investment Co.* v. *Smart*, L. R. 10 Ch. 567.

devise for life (*n*). So where an executor assigns his reversionary legacy, and afterwards wastes the assets, the legacy is liable to make good the *devastavit*, even against the assignee of the legacy (*o*).

In most of the cases the liability enforced in priority to assignees was against portions of the estate while still in bulk; but the principle does not apply to a fund carried over to a separate account and where the claim of the estate arises subsequent to the separation or latent at the time. The possibility that such a claim may be made against a trustee does not of itself disable him from making a *bonâ fide* assignment of his beneficial interest in the estate (*p*).

So where a legatee is ordered to pay the costs of the executor, the latter can deduct the costs out of the legacy, even against an assignee for value, pending the suit (*q*), in the same way as he can deduct a debt of the legatee to the estate (*r*).

So a debt of an executor will be set off against costs due to him, and if an executor joins a defaulting co-executor, he will only be entitled to a proportion of his costs (*s*).

What covenants to settle, &c. create a lien.

v.—Lien arising out of Covenants to settle or charge Land.—A general covenant to settle or charge land may amount to a lien, if given for good consideration, and if the particular lands intended to be settled or charged are identified, either by the instrument containing the covenant, or by a subsequent instrument, or are otherwise capable of being identified (*t*).

Breach of covenant to settle land.

So where a person covenants to pay to trustees a certain sum of money to be laid out in the purchase of lands, and does not pay the money, but afterwards purchases lands, but does not settle them, the lands will be deemed to have been purchased in fulfilment of the covenant, and will be subject to a lien in favour of persons interested under the settlement, even though

(*n*) *Egbert* v. *Butter*, 21 Beav. 560; *Exp. Barff*, De G. 613; *Fox* v. *Buckley*, 3 Ch. D. 508.

(*o*) *Morris* v. *Livie*, 1 Y. & C. C. C. 380; *Barnett* v. *Sheffield*, 1 De G. M. & G. 371; *Hopkins* v. *Gowan*, 1 Moll. 561.

(*p*) *Edgar* v. *Plomley*, (1900) A. C. 431.

(*q*) *Re Knapman*, 18 Ch. D. 300, C. A.

(*r*) *Ibid.* at p. 304.

(*s*) *Harmer* v. *Harris*, 1 Russ. 155; *Smith* v. *Dale*, 18 Ch. D. 516, Jessel, M.R., dissenting from *Watson* v. *Row*, L. R. 18 Eq. 680, V.-C. Hall. See *McEwan* v. *Crombie*, 25 Ch. D. 175.

(*t*) See *ante*, pp. 62, 63; and as to a covenant to appoint, see *ante*, p. 61.

the price of the estate exceeds the amount covenanted to be laid out (*u*).

Such a lien will not, however, attach to lands in which the covenantor was entitled at the time of entering into his covenant, though subsequently conveyed to him (*x*).

General indefinite covenant creates no lien.

But a general indefinite covenant to settle lands of a certain value by deed or will, will not, it seems, be enforced as against an alienee by conveyance *inter vivos* from the covenantor, nor after the covenantor's death against his other creditors (*y*); though it seems that, on principle, such a covenant should be enforced against the heir or devisee (*z*).

Priority between lien and legal mortgage.

A lien arising out of a covenant to settle or charge land will of course be postponed to a subsequent legal mortgage of the estate for valuable consideration without notice (*a*).

Priority between lien and equitable mortgage.

But a mere equitable charge, though accompanied by a deposit of deeds, will not prevail against such a lien which is prior in point of time (*b*). So where a man received a sum of money from his wife, and covenanted to purchase land with it and settle same, land purchased with the money by the husband, though conveyed to himself, was bound by the trusts of the settlement in priority to bankers with whom the title deeds were deposited (*c*).

Mortgagee bound by notice.

A mortgagee or purchaser with notice of a lien of this nature will be bound thereby, except in the case above mentioned of a general indefinite covenant.

vi.—Lien of Solicitor.—The lien of a solicitor is on papers and documents, or on judgments and funds, or under the stat. 23 & 24 Vict. c. 127, s. 28.

General lien for costs.

A solicitor has a general lien for his costs, &c. on the papers

(*u*) *Sowden* v. *Sowden*, 1 Bro. C. C. 582; *Lechmere* v. *Lechmere*, 3 P. Wms. 211; *Wilcox* v. *Wilcox*, 2 Vern. 558. And as to copyholds, see *Att.-Gen.* v. *Whorwood*, 1 Ves. Sen. 441; *Wilks* v. *Wilks*, 2 Eq. Ca. Abr. 218, pl. 3.

(*x*) *Gardner* v. *Townshend*, G. Cooper, 301; but see *Warde* v. *Warde*, 16 Beav. 103.

(*y*) *Fremoult* v. *Dedire*, 1 P. Wms. 429; *Hedges* v. *Everard*, 1 Eq. Ca. Abr. 18; *Ravenshaw* v. *Hollier*, 7 Sim. 3; *Williams* v. *Lucas*, 2 Cox, 161; *Mornington* v. *Keane*, 2 De G. & J. 292.

(*z*) *Tooke* v. *Hastings*, 2 Vern. 97; *Wellesley* v. *Wellesley*, 4 My. & Cr. 561. Though see Sug. V. & P. (ed. 14) 708; *Suffield* v. *Suffield*, 3 Mer. 699.

(*a*) *Exp. Poole*, 17 L. J. Bky. 12.

(*b*) *Ravenshaw* v. *Hollier*, 7 Sim. 3.

(*c*) *Manningford* v. *Toleman*, 1 Coll. 670. And see *Lane* v. *Dighton*, Amb. 409; *Lewis* v. *Madocks*, 17 Ves. 48, 57; *Price* v. *Blakemore*, 6 Beav. 507.

of his client in his hands (*d*). And the client is entitled, in consequence of such lien, to have the costs taxed (*e*).

Priority of lien of solicitor on deeds.

The effect of the general lien of a solicitor for his costs upon the papers of his client, as regards the question of priority seems to be, that this lien, being a mere right of retainer until the debt is satisfied, does not give any interest in, or right to, the land; and that it does not, as regards priority of incumbrances, possess the character of an incumbrance, the result of contract. It only binds the interest in the deeds which is from time to time left in the client, and therefore it is subject to incumbrances, whether legal or equitable, affecting the property, to which the deeds relate, at the time of the deposit with him (*f*); or, as regards future costs, is subject to incumbrances (including judgments, which are subsequently created by the client, while the deeds are in his, the solicitor's, hands, but before such future costs are incurred (*g*). A solicitor having a lien on the mortgagor's deeds loses it as against the mortgagee if he acts for both parties, it being his duty to give his client, the mortgagee, an unincumbered title (*h*).

Policy of life assurance.

So a solicitor in possession of a policy on which he has a lien for costs is not bound to give notice to the insurance company in order to ensure priority (*i*).

Floating security.

The lien of a solicitor upon the title deeds of a company in his possession is not prevented by the insertion in debentures given by way of floating security that the company shall not be at liberty to charge any of its assets in priority to such security (*k*).

Lien not to embarrass proceedings.

A solicitor will not be allowed to assert his lien for costs on papers, so as to embarrass the proceedings then in action, after a change of solicitors, but must produce the documents, when necessary, subject to his lien (*l*).

Lien of conveyancer or pleader.

This lien on papers appears to be a branch of the general

(*d*) *Warburton* v. *Edge*, 9 Sim. 508; *Christian* v. *Field*, 2 Ha. 177.

(*e*) *Re Barker*, 6 Sim. 476; *Re Rice*, 2 Keen, 181.

(*f*) *Smith* v. *Chichester*, 2 Dr. & War. 393; *Molesworth* v. *Robbins*, 2 J. & L. 358; *Pelly* v. *Wathen*, 1 De G. M. & G. 16.

(*g*) *Blunden* v. *Desart*, 2 Dr. & War. 405.

(*h*) *Re Snell*, 6 Ch. D. 105; *Re Mason*, 10 Ch. D. 729. See *Re Des Estates*, W. N. (1911) 100.

(*i*) *West of England Bank* v. *Batchelor*, 51 L. J. Ch. 199.

(*k*) *Brunton* v. *Electrical Engineering Corp.*, (1892) 1 Ch. 434; *ante*, p. 505.

(*l*) *Re Boughton, Boughton* v. *Boughton*, 23 Ch. D. 169; *Re Galland*, 31 Ch. D. 296, C. A.; *Boden* v. *Hensby*, (1892) 1 Ch. 101; *Gerty* v. *Mann*, 29 L. R. Ir. 7.

common law lien which every one has on an article given to him to work on for the amount of labour expended thereon (*m*), whether fixed by contract or not (*n*); and it has been extended so as to give a certificated conveyancer or special pleader a lien on the papers in his hands, so far as respects his costs on that particular account (*o*). But in such a case the work must be done on the papers, so as to give the additional value, and not merely be done with and in respect of those papers (*p*).

Specific lien of solicitor on fund in Court.

Independently of statute, a solicitor has a specific lien for the costs of, and immediately connected with, the suit, but not further, upon a fund recovered by him in that suit (*q*), and he is entitled to it notwithstanding the bankruptcy of the client or a winding up (*r*). The lien attaches on money of the client in the hands of the solicitor to abide the result of the suit (*s*). This specific lien, unlike the general lien of a solicitor on documents, may be actively enforced.

Lien after transfer of fund.

Where a fund has been transferred into the joint names of a client and a solicitor without declaration of trust, the lien for costs of proceedings connected with the transfer remains (*t*).

Extent of lien.

This common law lien, unlike the statutory lien to be presently considered, gives merely a right of retainer, and, accordingly, is limited to the interest thereon of the party who employed the solicitor, though other parties coming in to take the benefit of the suit must first contribute their proportion of the costs (*u*).

For the same reason this lien does not attach to real estate (*x*), and the solicitor retains this lien after the death of his client against the general creditors (*y*).

Taking security.

The question whether a lien is waived or not by the solicitor taking a security depends upon the intention expressed or implied of the parties. The facts must be looked at to see whether

(*m*) *Scarfe* v. *Morgan*, 4 M. & W. 270.
(*n*) *Chase* v. *Westmore*, 5 M. & S. 180.
(*o*) *Hollis* v. *Claridge*, 4 Taunt. 807.
(*p*) *Steadman* v. *Hockley*, 15 M. & W. 553.
(*q*) *Bozon* v. *Bolland*, 4 My. & Cr. 354; *Hall* v. *Laver*, 1 Ha. 571; *Stedman* v. *Webb*, 4 My. & Cr. 346.
(*r*) *Re Meter Cabs*, (1911) 2 Ch. 557.
(*s*) *Hanson* v. *Reece*, 3 Jur. N. S. 1204; *Verity* v. *Wylde*, 4 Drew. 427.
(*t*) *Re Robinson*, 5 Jur. N. S. 1020.
(*u*) *Hall* v. *Laver*, 1 Ha. 571. See *Re Watson*, 53 L. J. Ch. 305.
(*x*) *Shaw* v. *Neale*, 6 H. L. C. 581.
(*y*) *Lloyd* v. *Mason*, 4 Ha. 132.

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the solicitor has taken a security inconsistent with his lien or has made an arrangement with his client which sufficiently indicates an intention to waive the lien. If the security is inconsistent with the retention of the lien, the solicitor must give express notice to the client if he intends to retain it, otherwise it will be taken to be abandoned (*z*).

Protection of lien.

Under special circumstances the lien of a solicitor will be protected by a stop order (*a*), or by an injunction restraining payments to the client without notice to the solicitor, until the application of the solicitor for a charging order can be heard (*b*).

Charging order.

Before the passing of the Solicitors Act, 1860 (*c*), it was held that a solicitor had no lien for costs against real estate, either at law or in equity (*d*). But by sect. 28 of that Act it is provided that it shall be lawful for the Court or judge, before whom any suit, matter, or proceeding has been heard or is depending, to declare that any solicitor employed to prosecute or defend the same is entitled to a charge upon the property recovered or preserved, and thereupon such solicitor is to have a charge on the property of whatever nature, tenure, or kind the same may be; and all conveyances and acts done to defeat such charge, unless made to a *bonâ fide* purchaser for value without notice, are to be void as against such charge.

The power given by sect. 28 is discretionary, and will be rarely exercised by a court of bankruptcy (*e*). A court of bankruptcy has no power to make a charging order on property recovered in a Chancery action, though the property is represented by a dividend in bankruptcy (*f*); but it has jurisdiction if the property is recovered in the course of proceedings in bankruptcy (*g*).

Nature of the statutory charge.

The charge is in the nature of salvage, ranking in priority to subsisting incumbrances, and may be made on the interest of

(*z*) *Re Morris,* (1908) 1 K. B. 473, C. A. And see *Re Taylor, Stileman* v. *Underwood,* (1891) 1 Ch. 590; *Re Douglas Norman,* (1898) 1 Ch. 199.

(*a*) *Hobson* v. *Shearwood,* 8 Beav. 487.

(*b*) *Verity* v. *Wylde,* 4 Drew. 427; *Gerrard* v. *Dawes,* 18 W. R. 32.

(*c*) 23 & 24 Vict. c. 127.

(*d*) *Shaw* v. *Neale,* 6 H. L. C. 581; disapproving of *Barnesley* v. *Powell,* Amb. 102.

(*e*) *Re Humphreys, Exp. Lloyd-George,* (1898) 1 Q. B. 520, C. A.

(*f*) *Re Cook, Exp. Cripps,* (1899) 1 Q. B. 863.

(*g*) *Re Deakin, Exp. Daniell,* (1900) 2 Q. B. 489, C. A.

persons who did not employ the solicitor and who were not parties to the suit, if they adopt the benefit obtained in it (*h*).

Priority over existing mortgage.

A mortgage of property, which is the subject of a suit, is postponed to the lien of a solicitor employed therein who subsequently obtains a charging order under this Act, though such solicitor has approved the mortgage on his client's behalf (*i*).

The mere fact that a solicitor acts for the mortgagee as well as for the mortgagor will not deprive his lien of its priority over the mortgage (*k*).

Set-off.

A set-off for damages or costs may be allowed under Ord. LXV. r. 14, notwithstanding a solicitor's charging order, even in independent actions (*l*).

When lien attaches.

This lien does not attach until an order has been made for the payment of the costs of the client out of the fund (*m*).

Although the fact that a solicitor had no lien for his costs against real estate may have suggested the passing of the Act, it nevertheless applies to property of all kinds (*n*).

Meaning of word "preserved."

A liberal construction is put on the word "preserved"; where a receiver has been appointed of the real estate of an infant tenant in tail, it was held that the estate was "preserved" within the meaning of the Act (*o*), whether the appointment of the receiver were adverse (*p*) or by consent (*q*). Where the suit is for the benefit of all parties, as an administration suit, the lien attaches irrespective of the interest of the client (*q*). And a solicitor is entitled to a charging order, notwithstanding that his client compromises the action, and ceases to employ the solicitor (*r*). This, however, does not apply if nothing has been done beyond the appointment of a new trustee and the direction as to accounts (*s*). So where a trustee

(*h*) *Greer* v. *Young*, 24 Ch. D. 545, C. A.; *Charlton* v. *Charlton*, 52 L. J. Ch. 971; *Scholey* v. *Peck*, (1893) 1 Ch. 709; *Ridd* v. *Thorne*, (1902) 2 Ch. 344.

(*i*) *Scholey* v. *Peck*, (1893) 1 Ch. 709; *Cole* v. *Eley*, (1894) 2 Q. B. 350, C. A. See *Dennis* v. *Addy*, (1894) 1 Ir. R. 511; *Birnam Wood*, (1907) P. 1.

(*k*) *Macfarlane* v. *Lister*, 37 Ch. D. 88, C. A. See *Brunton* v. *Electrical Engineering Corp.*, (1892) 1 Ch. 434.

(*l*) *Goodfellow* v. *Gray*, (1899) 2 Q. B. 498.

(*m*) *Lord* v. *Colvin*, 2 Dr. & S. 82; *Re Green, Green* v. *Green*, 26 Ch. D. 16, C. A.

(*n*) *Birchall* v. *Pugin*, L. R. 10 C. P. 399.

(*o*) *Baile* v. *Baile*, L. R. 13 Eq. 497.

(*p*) *Twynam* v. *Porter*, L. R. 11 Eq. 181.

(*q*) *Bailey* v. *Birchall*, 2 H. & M. 371.

(*r*) *Moxon* v. *Sheppard*, 24 Q. B. D. 627. See *Ross* v. *Buxton*, 42 Ch. D. 190.

(*s*) *Pinkerton* v. *Easton*, L. R. 16 Eq. 490.

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having a beneficial interest defended a suit against a claim made upon the whole estate, the solicitor of the trustee had a lien under the Act (*t*). So where an executor brought an action to establish a will, his solicitor was entitled to a charging order on the property comprised in the will (*u*). Protecting an easement of real property, as a right to light, is not a "preserving" of property (*x*). Foreclosure obtained for the client is sufficient (*y*). The Act applies, though the incumbrance, the subject of the suit, is valueless, if it is a cloud on the title (*z*).

"Recovered."

The term "property recovered" includes a judgment obtained by the client (*a*), and also the costs payable to the client under a judgment (*b*), and also costs ordered to be refunded by the Court of Appeal (*c*).

Property must be recovered in a suit.

The property must have been recovered in the suit (*d*), or in a proceeding in a Court of justice (*e*). Money paid into Court is property recovered in the suit (*f*). "Proceeding" is not confined to an independent proceeding, but extends to any proceeding in an action (*g*).

Property must be directly affected by the suit.

The Court refused to make a charging order in an action in favour of a solicitor who appeared for the plaintiff in that action and an award arising out of it, upon a fund paid into the Court of Bankruptcy by his client in a collateral proceeding against him, in which the solicitor did not act. An award was made in the action awarding that fund to him; but the Court held that the fund was not sufficiently directly affected by the action and award (*h*).

The lien attaches on the proceeds of sale of a ship sold under a subsequent suit, when the former suit was successfully defended, and in priority to claims for necessaries and wages (*i*).

(*t*) *Bulley* v. *Bulley*, 8 Ch. D. 479, C. A.

(*u*) *Exp. Tweed*, (1899) 2 Q. B. 167, C. A.

(*x*) *Foxon* v. *Gascoigne*, L. R. 9 Ch. 654.

(*y*) *Wilson* v. *Round*, 4 Giff. 416; *Scholefield* v. *Lockwood*, L. R. 7 Eq. 83.

(*z*) *Jones* v. *Frost*, L. R. 7 Ch. 773.

(*a*) *Birchall* v. *Pugin*, L. R. 10 C. P. 397.

(*b*) *Johnston* v. *McKenzie*, (1911) 2 Ir. R. 118.

(*c*) *Guy* v. *Churchill*, 35 C. D. 489.

(*d*) *Greer* v. *Young*, 24 Ch. D. 545, C. A.

(*e*) *Re Humphreys, Exp. Lloyd-George*, (1898) 1 Q. B. 520, C. A.

(*f*) *Clover* v. *Adams*, 6 Q. B. D. 622; *Emden* v. *Carte*, 19 Ch. D. 311, C. A.

(*g*) *Re Cockrell's Estate*, (1911) 2 Ch. 318.

(*h*) *Pierson* v. *Knutsford Est. Co.*, 32 W. R. 451, C. A.

(*i*) *Heinrich*, L. R. 3 A. & E. 505.

The Court has power to charge the funds as against everybody interested, provided they are before the Court, but will not do so unless satisfied that the client who employed the solicitor was not able to pay the costs himself (*k*). Extent of power to charge.

Every assignee from the client who knows of the existence of the suit has notice of the lien of the solicitor; and the solicitor need not therefore give notice to an intending assignee (*l*). Notice of lien.

The order should be restricted to costs properly incurred in recovering or preserving the particular property (*m*). Costs between solicitor and client may be charged, but not as against other persons unless the solicitor is unable to recover from his own client the difference between solicitor and client and party and party costs (*n*). What costs are charged.

The solicitor is also entitled to charge the costs of his application (*o*).

The lien will not be extended to claims of a solicitor in respect of charges due to him in a capacity other than that of solicitor (*p*).

As the statutory lien only extends to costs of a suit, matter or proceeding tried before a Court or judge, it does not enable a charging order to be made for costs of an arbitration under the Lands Clauses Act (*q*).

The assignee of costs incurred to a solicitor may obtain a charging order on the property recovered by the solicitor in the action (*r*).

If there is a change of solicitors during the action, the one who was actually the soli itor when the fund was recovered is entitled to the first lien on the fund for his costs of the action (*s*).

An express security on the subject-matter of the action disentitles the solicitor to a charging order (*t*).

The benefit of the lien may be lost if a long time elapses before the solicitor applies for a charging order, especially if in

(*k*) *Jackson* v. *Smith*, 53 L. J. Ch. 972.

(*l*) *Faithfull* v. *Ewen*, 7 Ch. D. 495, C. A. See *Paris*, (1896) P. 77; *Birnam Wood*, (1907) P. 1; *ante*, p. 1349.

(*m*) *Emden* v. *Carte*, 19 Ch. D. 311, C. A.; *Mackenzie* v. *Mackenzie*, 64 L. T. 706, C. A.

(*n*) *Re Horne & Sons*, (1906) 1 Ch. 271.

(*o*) *Haymes* v. *Cowper*, 33 Beav. 431; *Twyman* v. *Porter*, *sup.*; *Re Keane*, L. R. 12 Eq. 115, 124.

(*p*) *Re Walker*, *Meredith* v. *Walker*, 68 L. T. 517.

(*q*) *Macfarlane* v. *Lister*, 37 Ch. D. 88, C. A.

(*r*) *Baile* v. *Baile*, L. R. 13 Eq. 497; *Briscoe* v. *Briscoe*, (1892) 3 Ch. 543.

(*s*) *Cormack* v. *Beisly*, 3 De G. & J. 157; *Re Wadsworth*, *Rhodes* v. *Sugden*, 34 Ch. D. 155.

(*t*) *Groom* v. *Cheesewright*, (1895) 1 Ch. 730.

the meantime there has been an alteration in the rights of parties (*u*). But mere delay of three years will not disentitle him to an order unless intervening creditors might be thereby prejudiced (*x*).

Setting aside order.

An application to the Court to set aside a charging order must be made with reasonable promptitude; a delay of two months is too long (*y*).

vii.—**Liens of Bankers and Brokers.**—By the law merchant, bankers (*z*), and brokers (*a*), have a lien on all bills, papers, and securities of their customers in their hands, unless there be an express contract or circumstance that shows an implied contract inconsistent with the lien (*b*); and the trustee in bankruptcy of the banker, by virtue of the lien, may sue the drawer of securities so deposited, which are payable to bearer (*c*).

Extent of lien.

But this species of lien only affects things which come into the hands of the party claiming it in the way of his trade, and may be rebutted by an express or implied contract to the contrary. Thus, it was held that a banker had no lien upon a lease accidentally left with him after he had refused to advance money upon it (*d*); so, where exchequer bills (though these are negotiable securities passing to the *bonâ fide* holder for value) were deposited at a banker's in a box belonging to the depositor, of which he kept the key, and when renewable the bills were given by the depositor to the bankers, in order that they might receive the interest, and the new bills were then handed over to the depositor to be placed in the box, and the interest received carried to his account, it was held by the House of Lords that the bankers had no lien for their general balance on the bills (*e*). So a deposit of securities not negotiable to secure a certain sum

(*u*) *Roche* v. *Roche*, 29 L. R. Ir. 339, C. A.

(*x*) *Re Born, Curnock* v. *B.*, (1900) 2 Ch. 433.

(*y*) *Re Deakin, Exp. Daniell*, (1900) 2 Q. B. 489, C. A.

(*z*) *Davis* v. *Bowsher*, 5 T. R. 488; *Brandao* v. *Barnett*, 2 Sc. N. R. 96; 12 Cl. & F. 787; *Bolland* v. *Bygrave*, Ry. & M. 271.

(*a*) *Hewison* v. *Guthrie*, 2 Bing. N. C. 755; *Jones* v. *Peppercorne*, John. 430.

(*b*) *London Chartered Bk. of Australia* v. *White*, 4 App. Ca. 413. See *Wilde* v. *Radford*, 9 Jur. N. S. 1110; *Leese* v. *Martin*, 17 Eq. 236; *Misa* v. *Currie*, 1 App. Ca. 554; *Re European Bk., Agra Bank Claim*, L. R. 8 Ch. 41.

(*c*) *Scott* v. *Franklin*, 15 East, 428.

(*d*) *Lucas* v. *Dorrien*, 7 Taunt. 278.

(*e*) *Brandao* v. *Barnett*, 2 Sc. N. R. 96, reversing *Barnett* v. *Brandao*, 6 Man. & Gr. 658.

will not give the bankers a lien for a further sum, if the depositor afterwards overdraws his account (*f*).

So the lien does not attach to securities deposited by a customer known to the bank to belong to some other person and to have been deposited for a special purpose (*g*).

Separate accounts cannot be set off.

If A. and B. have a joint account, and A. has a separate account, with a bank, the bankers cannot, upon the order of A., or of A. and B., after a suspension of payment by the bank, set off the balance against the bank upon one account against the balance in favour of the bank upon the other account; nor has the bank a lien upon one balance for the money due upon the other (*h*); and a banker has no lien which enables him to set off a debt due on the customer's private account against a balance standing to his credit on a trust account (*i*).

Discharge of lien by taking security.

A banker's general lien will be discharged if the customer gives a security for overdrafts not exceeding a specified amount; and the charge will be limited to that amount (*k*).

Stockbroker.

A stockbroker has, however, in the absence of special agreement to the contrary, a general lien on a customer's securities, even though they were deposited as security for a particular loan which has been paid off (*l*).

Nature of maritime lien.

viii.—Maritime Liens.—A maritime lien is the foundation of the proceeding *in rem*, a process to make perfect a right inchoate from the moment the lien attaches on arrest of the ship (*m*). It is binding upon a mortgagee or purchaser for value without notice, but it may be lost by delay (*n*).

Lien declared by foreign Court.

A maritime lien declared by a foreign Court will be recognized, but the foreign decree must show that the proceeding was for sale of the ship (*o*).

Extent of maritime lien.

There is no maritime lien except in the case of wages (*p*), salvage, including such towage and pilotage services as are in

(*f*) *Vanderzee* v. *Willis*, 3 Bro. C. C. 21.

(*g*) *Cuthbert* v. *Robarts, Lubbock & Co.*, (1909) 2 Ch. 226, C. A.

(*h*) *Watts* v. *Christie*, 18 L. J. Ch. 173. See *Wolstenholm* v. *Sheffield Union Banking Co.*, 54 L. T. 746, C. A.

(*i*) *Exp. Kingston*, L. R. 6 Ch. 632.

(*k*) *Re Bowes, Earl of Strathmore* v. *Vane*, 33 Ch. D. 586.

(*l*) *Re London and Globe Finance Corp.*, (1902) 2 Ch. 416; *Hope* v. *Glendinning*, (1911) A. C. 419.

(*m*) *Cella*, 13 P. D. 82, C. A.

(*n*) *Bold Buccleuch*, 7 Moo. P. C. 267; *Europa*, 2 Moo. P. C. N. S. 1; *Nymph*, Swab. 86.

(*o*) *City of Mecca*, 6 P. D. 106, C. A.

(*p*) *Nicolai Heinrich*, 17 Jur. 329.

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the nature of salvage (*q*), and collisions (*r*). There is no lien, except by statute, on ships for necessaries supplied, or repairs executed (*s*).

Priorities as between mortgages and maritime liens generally.

Although a mortgagee of a ship obtains, by registration, priority over all mortgages subsequently registered, or not registered at all, and although his security is not affected by mere personal claims against the mortgagor, which do not, at the time of registration, confer any lien on the ship, he will, whether in possession or not, be postponed to all existing liens (*t*), and to all the maritime liens above referred to, and also to bottomry (*u*), though such liens are subsequently acquired (*x*); and, if the vessel be allowed to remain in the possession of the mortgagor, to the possessory lien of a shipwright, to whom the mortgagor has, in the ordinary course, entrusted the vessel for repairs (*y*).

Merchant Shipping Act, 1894.

By the Merchant Shipping Act, 1894 (*z*), re-enacting in this respect the provisions of the Merchant Shipping Act, 1854 (*a*), it is enacted that—

Remedies of master for recovery of wages.

Sect. 167.—"(1.) The master of a ship shall, so far as the case permits, have the same rights, liens, and remedies for the recovery of his wages as a seaman has under this Act, or by any law or custom."

The section applies to masters of foreign ships (*b*). It also applies to a bonus to be paid to a master if he remains on the ship and satisfies the owners (*c*).

This provision relates only to claims for the master's wages against the owner and his property, and does not alter the relation between master and seamen (*d*).

(*q*) *Salacia*, Lush. 545; *Dowthorpe*, 2 W. Rob. Adm. 73; *Louisa Bertha*, 14 Jur. 1006; *Linda Flor*, 4 Jur. N. S. 172; *Lady Durham*, 3 Hagg. Adm. 196.

(*r*) *Zodiac*, 1 Hagg. Adm. 320, 325.

(*s*) *Hussey* v. *Christie*, 9 East, 426; 13 Ves. 594; *Neptune*, 3 Hagg. Adm. 129; *Wilkins* v. *Carmichael*, Doug. 101; *Buxton* v. *Snee*, 1 Ves. Sen. 154; *Watkinson* v. *Bernadiston*, 2 P. Wms. 367; *Smith* v. *Plummer*, 1 B. & Ald. 575; *Pacific*, Br. & L. 243; *Scio*, L. R. 1 A. & E. 353; *Aneroid*, 2 P. D. 189; *Lyons*, 6 Asp. N. S. 199; *Stainbank* v. *Fenning*, 11 C. B. 51, per Jervis, C.J.

(*t*) Abbott on Ships, 49. See *Nymph*, Swab. 86; *Ripon City*, (1897) P. at p. 243.

(*u*) *Post*, Chap. LXV.

(*x*) *Aline*, 1 W. Rob. Adm. 111; *Dowthorpe*, 2 W. Rob. Adm. 73; *Royal Arch*, Swab. 269; *Heligoland*, Swab. 491.

(*y*) *Williams* v. *Allsop*, 10 C. B. N. S. 417.

(*z*) 57 & 58 Vict. c. 60.

(*a*) 17 & 18 Vict. c. 104, s. 191.

(*b*) *Tagus*, (1903) P. 44.

(*c*) *Elmville*, (1904) P. 422.

(*d*) *Salacia*, Lush. 545.

The master's lien for services and disbursements is not affected by the circumstance that the possession of the vessel at the time when they were given and made was fraudulent, if he were not privy to the fraud (*e*), or by his being part owner of the ship (*f*).

Fraudulent possession of ship does not oust master's lien.

Where the master of a ship executes a security thereon which does not bind himself, he is entitled to his wages in priority to the holder (*g*). But where the master has guaranteed payment of a debt secured by mortgage of the ship, he must postpone his lien for wages to the extent of his guarantee (*h*).

Priority of master's lien over security given by him.

The lien of the shipwright has priority over the lien of the master and crew from the time of his taking possession, even though the master and crew remain on board, and though the repairs are not completed (*i*).

Lien of shipwright.

Seamen have a maritime lien upon the ship for their wages, which takes priority over all common law claims (*k*), including the common law possessory lien of a shipwright up to the time of the beginning of such lien (*l*).

Lien of seamen for wages.

Seamen engaged for a voyage are entitled to a lien on the ship for their wages although the ship does not proceed upon the voyage, and notwithstanding that their engagement was not in writing (*m*).

A seaman cannot, by agreement, forfeit his lien on the ship, or be deprived of any remedy for recovery of his wages, even in case of loss of the ship (*n*).

Lien for wages cannot be excluded.

A master or seaman has a lien for wages on any freight already earned, but not on accruing freight (*o*). In one case, under special circumstances, a master was allowed a lien on freight earned under a charterparty made by him *ultra vires* but adopted by the owner (*p*).

Lien on freight.

But the seaman has no lien for wages upon the cargo or the money in respect of insurance, nor upon any other ship than that in which he performed his services (*q*). He has, however,

Lien for wages on cargo and freight.

(*e*) *Edwin*, Br. & L. 281.
(*f*) *Feronia*, L. R. 2 A. & E. 65.
(*g*) *Salacia*, Lush. 545.
(*h*) *Bangor Castle*, 74 L. T. 768.
(*i*) *Tergeste*, (1903) P. 26.
(*k*) *Andalina*, 12 P. D. 1. As to enforcing the lien, see sect. 165 of M. S. Act, 1894.
(*l*) *Gustaf*, Lush. 506; *Immacolata Concezione*, 9 P. D. 37.
(*m*) *Re Great Eastern Steamship Co., Claim of Williams and others*, 53 L. T. 594.
(*n*) 57 & 58 Vict. c. 60, s. 156.
(*o*) *Gibson* v. *Ingo*, 6 Ha. 112; *Smith* v. *Plummer*, 1 B. & Ald. 575; *Atkinson* v. *Cotesworth*, 3 B. & Cr. 647.
(*p*) *Bristow* v. *Whitmore*, 9 H. L. C. 391.
(*q*) *Julindhur*, 1 Spinks, 71.

a right to arrest the cargo when it reaches its destination in order to enforce his lien on the freight (*r*).

The maritime lien for wages takes precedence of a claim for payments made for towage (*s*).

Lien for salvage.

In cases of salvage the maritime law forms an exception to the general principle of the common law. "The maritime law, for the purposes of public policy and for the advantage of trade, imposes in these cases a liability on the thing saved, a liability which is a special consequence arising out of the character of mercantile enterprises, the nature of sea perils, and the fact that the thing saved was saved under great stress and exceptional circumstances" (*t*).

The right to salvage may arise out of an actual contract; but it may arise independently of any contract (*u*).

Lien cannot be abandoned.

A master or seaman cannot abandon any right he may have of the nature of salvage (*x*), except pursuant to an agreement made in accordance with the Act (*y*).

Lien of shipowner on cargo for salvage money paid.

Shipowners are not primarily liable to pay salvage in respect of cargo (*z*). But shipowners who have paid a sum in respect of salvage have a lien on the cargo to the extent of the contribution payable by the owners of the cargo; but the fact that the shipowners have bound themselves to pay a particular sum is not conclusive that the whole of that sum was chargeable to general average, so as to bind the cargo owners to pay their proportion (*a*).

General average creates no lien.

The owners of cargo sold for the necessities of the ship have no lien on the ship for the amount of their loss which is the subject of general average (*b*).

Nor does the right to general average contribution after adjustment give the owner of the cargo any lien under the maritime law, unless by reason of the possession of the cargo it can be retained as a possessory lien (*c*).

(*r*) *Andalina*, 12 P. D. 1.
(*s*) *Ibid.*
(*t*) Per Bowen, L.J., in *Falcke* v. *Scottish Imperial Insurance Co.*, 34 Ch. D. 234, at p. 248, C. A.
(*u*) *Five Steel Barges*, 15 P. D. 142.
(*x*) 57 & 58 Vict. c. 60, ss. 156, 167.
(*y*) *Ibid.* And see s. 554.
(*z*) *Raisby*, 10 P. D. 114.
(*a*) *Anderson, Tritton & Co.* v. *Ocean Steamship Co.*, 10 App. Ca. 107. See *Briggs* v. *Merchant Traders' Ship, &c. Assoc.*, 13 Q. B. 167.
(*b*) *Constantia*, 2 W. Rob. Adm. 487.
(*c*) *North Star*, Lush. 45; *Cleary* v. *M'Andrew*, 2 Moo. P. C. N. S. 216.

The maritime lien for salvage takes precedence of the maritime lien for wages (*d*).

Priority of salvage lien.

Salvage in respect of saving life, when payable by the owner, takes precedence over all other claims for salvage (*e*).

Lien for towage.

Towage in the nature of salvage is the subject of maritime lien (*f*); but there is no maritime lien for ordinary towage services rendered to a ship (*g*).

The conditions required to engraft a claim for salvage on to an agreement for towage, were considered in the case of "*The Liverpool*" (*h*).

Lien for pilotage.

A lien arises, and is termed "pilotage lien," where a person, not as pilot, undertakes the guidance of a vessel under extraordinary circumstances, so as in effect to render salvage services (*i*).

The rights of pilots in respect of their ordinary pilotage fees are regulated by the Merchant Shipping Act, 1894 (*k*).

In order to entitle a pilot to salvage reward, the rule of law is that "he must not only show that the ship was in some sense in distress, but that she was in such distress as to be in danger of being lost, and such as to call upon him to run such unusual danger, or incur such unusual responsibility, or exercise such unusual skill, or perform such an unusual kind of service, as to make it unfair and unjust that he should be paid otherwise than upon the terms of salvage reward" (*l*).

Lien for damage by collision.

There is also a lien upon a ship and freight for the amount of the damage which, by the fault of those in charge of it, it does to another ship.

Ground of the lien.

"The foundation of the lien is the negligence of the owners or their servants at the time of the collision, and if that be not proved no lien comes into existence, and the ship is no more liable than any other property which the owners at the time of collision may have possessed" (*m*). In order to give rise to a maritime lien, the ship against which the lien is claimed must be the instrument of mischief, and some act of navigation of the

(*d*) *Gustaf*, Lush. 506.
(*e*) 57 & 58 Vict. c. 60, s. 544 (2).
(*f*) *La Constancia*, 2 W. Rob. Adm. 404; *St. Lawrence*, 5 P. D. 250. See *Hestia*, (1895) P. 193.
(*g*) *Westrupp* v. *Great Yarmouth Steam Carrying Co.*, 43 Ch. D. 241.
(*h*) (1893) P. 154. See also *Westbourne*, 14 P. D. 132; *Five Steel Barges*, 15 P. D. 142.
(*i*) *Aglaia*, 13 P. D. 160, 162.
(*k*) 57 & 58 Vict. c. 60, s. 591.
(*l*) Per Brett, L.J., in *Akerblom* v. *Price*, 7 Q. B. D. 129, at p. 135.
(*m*) Per Sir F. Jeune in *Utopia*, (1893) A. C. 494, at p. 499.

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ship itself must either mediately or immediately be the cause of the damage (*n*).

Liability of ship in tow.

In case of a vessel in tow coming into collision with a third vessel by reason of the negligence of those on board the tug, the question whether the crew of the tug are to be regarded as the servants of the owner of the vessel in tow must depend upon the circumstances of each case, and the lien will or will not attach accordingly (*o*).

Bar of action on lien.

There is no Statute of Limitations applicable to a claim of this kind, nor will the Court adopt, on analogy of the Statute of Limitations, any fixed period within which such a claim must be brought. An action may, however, be barred upon the principle of laches: in the application of this principle "it is necessary in each case to look to the particular circumstances, and see whether it would be inequitable, after the period of time, which, of course, is to be taken into account, and after the circumstances which may have happened (including amongst these the loss of witnesses, the loss of evidence, and including also the change of property), to entertain a suit of this kind" (*p*).

Priority of lien.

The maritime lien for damages arising from a collision takes precedence of the maritime lien for wages (*q*).

Lien for necessaries.

Independently of statute, the Admiralty Court has no jurisdiction to entertain a suit for necessaries (*r*).

Adm. Court Act, 1840.

It is now settled that the 6th section of the Admiralty Court Act, 1840 (*s*), does not confer a maritime lien, and that a registered mortgagee is entitled to priority over a claim for necessaries supplied to a foreign ship within such section (*t*).

There is no jurisdiction under this Act in respect of claims by a mate for necessary disbursements at the request of the owner (*u*).

Adm. Court Act, 1861.

By the Admiralty Court Act, 1861 (*x*), the Admiralty Division of the High Court has jurisdiction over claims for the

(*n*) *Currie* v. *M'Knight*, (1897) A. C. 97.
(*o*) *Quickstep*, 15 P. D. 196.
(*p*) Per Sir James Hannen in *Kong Magnus*, (1891) P. 223, at p. 228. See also *Bold Buccleuch*, 7 Moo. P. C. C. 267; *Europa*, 2 Moo. P. C. N. S. 1; *Fairport*, 8 P. D. 48.
(*q*) *Benares*, 7 N. of C. 54, suppl.; *Elin*, 8 P. D. 129, C. A.
(*r*) *Neptune*, 3 Hagg. Adm. 129; *Pacific*, Br. & L. 243; *Laws* v. *Smith*, *Rio Tinto*, 9 App. Ca. 356.
(*s*) 3 & 4 Vict. c. 65, s. 6.
(*t*) *Northcote* v. *Heinrich Bjorn*, 11 App. Ca. 270.
(*u*) *Victoria*, 37 L. J. Ad. 12. See now sect. 167 of Act of 1894.
(*x*) 24 & 25 Vict. c. 10, ss. 4—7. See 53 & 54 Vict. c. 27.

building, equipping, or repairing of any ship, if at the time of the institution of the cause the ship or the proceeds thereof are under the arrest of the Court, and over claims for necessaries supplied to British and colonial ships elsewhere than in the port to which the ships belong, unless it is shown to the satisfaction of the Court that at the time of the institution of the cause any owner or part owner is domiciled in England or Wales; and over claims for damage to goods carried into any port in England or Wales. The Court also has jurisdiction over any claim for damage done by any ship. The word "owner" means owner at the time of supply (*y*).

Supplies to British and colonial ships.

No maritime lien is created under this statute until the suit is actually instituted; until then the *res*, the ship, does not become chargeable with the debt for necessaries; and all valid charges on the ship to which any person other than the owner of the ship, who is liable for the necessaries, is entitled, must take precedence (*z*).

No lien until suit.

The claim of a registered mortgagee is, it seems, entitled to priority over a claim for damages to cargo under sect. 6 of the Act of 1861 (*a*).

A claim for necessaries under sect. 5 of the Act of 1861 takes priority over a vendor's lien for the purchase-money of the ship (*b*).

The Act of 1861 confers jurisdiction over claims for repairs and necessaries done and supplied to a foreign ship in a foreign port (*c*).

By the Merchant Shipping Act, 1894 (*d*), re-enacting a corresponding provision of the repealed Merchant Shipping Act, 1889 (*e*), it is enacted—

Merchant Shipping Act, 1894.

Sect. 167.—"(2.) The master of a ship shall, and every person lawfully acting as master of a ship by reason of the decease or incapacity of the master of the ship shall, so far as the case permits, have the same rights, liens, and remedies for the recovery of disbursements or liabilities properly made or incurred by him on account of the ship as a master has for the recovery of his wages."

Remedy of master for disbursements.

(*y*) *Ella A. Clark*, Br. & L. 32.

(*z*) *Two Ellens*, L. R. 4 P. C. 161; *Gustaf*, Lush. 506; *Pieve Superiore*, L. R. 5 P. C. 482; *Troubadour*, L. R. 1 A. & E. 302; *Pacific*, Br. & L. 243; *Aneroid*, 2 P. D. 189.

(*a*) *Pieve Superiore*, L. R. 5 P. C. 482.

(*b*) *Foong Tai* v. *Buchheister*, (1908) A. C. 458.

(*c*) *The Mecca*, (1895) P. 95, C. A.; overruling *India*, 9 Jur. N. S. 417.

(*d*) 57 & 58 Vict. c. 60.

(*e*) 52 & 53 Vict. c. 46.

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Except by virtue of statute, the master of a ship has no lien on it for repairs or other expenses of the ship (*f*).

Priority of lien as against mortgagees.

The effect of this enactment is only to create a lien where the liabilities are such as would, by virtue of the master's general authority, have pledged the owner's credit, that is to say, where it is necessary and the duty of the master that necessaries should be supplied, and where he cannot have recourse to the owners before ordering them (*g*).

The master of a ship appointed by persons who are not the real owners, but who have been allowed by the real owners to have possession and control of the vessel, may have a lien for his disbursements and liabilities, although the owners may not be liable for such disbursements and liabilities (*h*).

Where there is no lien for disbursements on the ship itself, there can be no lien on freight in respect of the same debt (*i*).

Part owner's lien for disbursements.

A part owner is entitled, as against the other part owners, to have his disbursements for the repairs and outfit of the ship, so far as the same are necessary and proper for the joint adventure, repaid to him out of the freight and other earnings of the ship before any division of profits is made, according to the general law of partnership; nor is the case altered by the fact of a part of the outlay having been made upon the hull, as to which the rules of partnership do not apply, the part owners being *tenants in common* of this. It follows that a mortgagee of certain shares of the ship and freight is subject to the like deductions, unless a different state of things should arise from the mortgagee taking possession and acting as part owner (*k*).

But the payment of money by the owner of a majority of the shares in a ship, who is in possession and acting as managing owner, to free the ship from liens attaching to her in respect of matters for which he is not personally liable, does not *ipso facto* entitle him to claim a proportionate part of such payment as against a mortgagee of other shares (*l*).

A shipowner retaining possession of the ship has a lien on the cargo for the hire of the vessel, as against the charterer himself,

(*f*) *Hussey* v. *Christie*, 9 East, 426. See *Hebe*, 2 W. Rob. 412.

(*g*) *Orienta*, (1895) P. 49; *Castlegate Steamship Co.*, (1893) A. C. 38; but see *Ripon City* (No. 1), *inf.* See, as to the extent of a master's authority in respect of repairs, *Benson* v. *Chapman*, 2 H. L. C. 696.

(*h*) *Ripon City* (No. 1), (1897) P. 226.

(*i*) *Castlegate Steamship Co.*, *sup.*

(*k*) *Green* v. *Briggs*, 6 Ha. 395.

(*l*) *Ripon City* (No. 2), (1898) P. 78.

to the full amount of the lien, and, as against sub-freighters, to the extent of the freight due on their bills of lading (*m*); and such lien will exist even if the ship is actually demised to the charterer, if the agreement contain other stipulations sufficient to rebut the inference that the owner meant to part with the possession of the vessel; as where payment of the hire is either precedent to or concomitant with the delivery of the goods (*n*), or where the lien is expressly reserved (*o*); but otherwise, such demise of the ship to the charterer will exclude the lien (*p*); and so it would seem, that if by the agreement the goods are to be delivered before payment of the hire, the lien cannot be supported. But in each case the whole contract must be taken together, and due effect given to the several clauses that counteract and qualify each other (*q*).

Where the master signs bills of lading specifying the freight, the shipowner has a lien for that only, although by the charter-party he is entitled to a larger freight (*r*). There is no lien for freight which is not to be paid until after the delivery of the cargo (*s*). Where by the bill of lading the freight is payable at the port of shipment, the shipowner has no lien for the freight (*t*), notwithstanding a local usage to the contrary (*u*). Delivery of the goods ousts the lien (*x*). Where no consignee can be found, the lien for freight is not lost by landing and warehousing the cargo (*y*).

The shipowner has no lien on the cargo for dead freight (*z*), nor for demurrage (*a*), nor for port charges (*b*), nor wharfage (*c*),

(*m*) *Saville* v. *Campion*, 2 B. & Al. 503; *Campion* v. *Colvin*, 3 Bing. N. C. 17; *Paul* v. *Birch*, 2 Atk. 621; *Mitchell* v. *Scaife*, 4 Camp. 298. As to lien on sub-freights, see *Tagart, Beaton & Co.* v. *Fisher*, (1903) 1 K. B. 391, C. A.

(*n*) *Mitchell* v. *Scaife, sup.*; *Birley* v. *Gladstone*, 3 M. & S. 205; *Yates* v. *Railston*, 8 Taunt. 293; *Christie* v. *Lewis*, 2 Br. & B. 410.

(*o*) *Small* v. *Moates*, 9 Bing. 574; *Gledstanes* v. *Allen*, 12 C. B. 202, 219. And see *Peek* v. *Larsen*, L. R. 12 Eq. 378.

(*p*) *Hutton* v. *Bragg*, 7 Taunt. 14; *Newberry* v. *Colvin*, 7 Bing. 190; *Belcher* v. *Capper*, 4 Man. & Gr. 502.

(*q*) Per Tindal, C.J., 4 Man. & Gr. 541.

(*r*) *Gilkison* v. *Middleton*, 2 C. B. N. S. 134.

(*s*) *How* v. *Kirchner*, 11 Moo. P. C. 21; *Foster* v. *Colby*, 28 L. J. Ex. 81.

(*t*) *How* v. *Kirchner, sup.*

(*u*) *Kirchner* v. *Venus*, 12 Moo. P. C. 361.

(*x*) *North* v. *Gurney*, 1 J. & H. 509.

(*y*) *Mors le Blanch* v. *Wilson*, L. R. 8 C. P. 227.

(*z*) *Gray* v. *Carr*, L. R. 6 Q. B. 522.

(*a*) *Phillips* v. *Rodie*, 15 East, 547; *Birley* v. *Gladstone*, 3 M. & S. 205.

(*b*) *Faith* v. *East India Co.*, 4 B. & Ald. 630, 642.

(*c*) *Bishop* v. *Ware*, 3 Camp. 360.

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unless there is an express stipulation in the charter-party (*d*), and even then he may be debarred by his own default from asserting such lien (*e*).

ix.—Lien of Company on Shares.—The articles of a company may stipulate that the shares shall be subject to a lien for debts due to the company (*f*); and a company may alter its articles so as to acquire a lien on shares (*g*).

The company's lien attaches only for the debt of the registered holder; if he is a trustee a company cannot assert a lien for the debt due from beneficiaries (*h*).

When by the company's articles the company has a lien on the shares of a member for all moneys owing by him to the company, a loan to him by the company is authorised by a power given to the company to lend upon security (*i*).

The articles may provide that during the continuance of the lien thereby conferred, the member's right to transfer his shares shall be dependent upon the approval of the directors (*k*).

The principle of *Hopkinson* v. *Rolt* (*l*) applies, however, to this lien; and, accordingly, it will not take priority over an equitable mortgage of the shares after notice thereof has been given to the company in respect of moneys which become due from the shareholder after such notice (*m*).

Right to require transfer of lien.

A lien on shares is a charge on the shares within the meaning of sect. 2 (vi) of the Conveyancing Act, and the shareholder is accordingly entitled, under sect. 15 of that Act, to require the company to assign the debt and the lien on the shares to his nominee on payment by him of the amount due (*n*).

Discharge of lien.

A company's lien is lost if it registers a transfer of the shares; but a dividend declared after the execution of a trans-

(*d*) *M'Lean* v. *Fleming*, L. R. 2 H. L. Sc. 128.
(*e*) *Kish* v. *Taylor*, (1911) 1 K. B. 625.
(*f*) *Re General Exchange Bank, Re Lewis*, L. R. 6 Ch. 818.
(*g*) *Allen* v. *Gold Reefs, &c.*, (1899) 2 Ch. 40, 48.
(*h*) *Re Perkins, Exp. Mexican Mining Co.*, 24 Q. B. D. 613.
(*i*) *Re National Bank of Wales*, (1899) 2 Ch. 649.
(*k*) *Bank of Africa* v. *Salisbury Gold Co.*, (1892) A. C. 281.
(*l*) 9 H. L. C. 514.
(*m*) *Bradford Banking Co.* v. *Briggs*, 12 App. Ca. 29; and see *West* v. *Williams*, (1899) 1 Ch. 132, C. A.
(*n*) *Everitt* v. *Automatic Weighing Machine Co.*, (1892) 3 Ch. 506.

fer, but before registration, can be retained by the company in exercise of its lien (*o*).

A lien on shares may be discharged by a new arrangement between the company and shareholder, the terms of which are incompatible with its retention or which show an intention to waive it (*p*).

(*o*) *Re McMurdo*, 8 T. L. R. 507. *Gold Co., sup.* See *Re Morris*,
(*p*) *Bank of Africa* v. *Salisbury* (1908) 1 K. B. 473.

Part VIII.

THE DISCHARGE OF MORTGAGES.

CHAPTER LX.

THE DISCHARGE OF THE SECURITY BY RELEASE OF THE DEBT.

Effect of release of debt.

i.—What is necessary to an effectual Release of a Debt.—An effectual release of a debt discharges all securities for the same, whether original or collateral, in the hands of a creditor (*a*). A release may be express or implied from conduct.

Deed necessary to release of specialty debt.

It is a general rule of law that a contract must be discharged in the same form in which it was made. Where the re-payment of a debt or loan is secured by deed, this being a specialty contract cannot be discharged at law except by deed (*b*). A release by deed of all debts, without more words, will discharge and release all debts then owing from the releasee to the releasor upon specialties or otherwise (*c*).

Release of parol debt.

A parol contract, whether by writing not under seal or by word of mouth, may be released either by simple writing or by word of mouth, even though the original contract was in writing. And it would appear that a parol release would be sufficient even in cases where the contract is required by statute to be in writing (*d*); but in such a case the release must be absolute, and not be such as, in effect, to create a new agreement by word of mouth contrary to the statute (*e*).

Release of cause of action.

But although an executory parol agreement may be discharged by parol, yet a cause of action which has actually

(*a*) *Cooper* v. *Green*, 7 M. & W. 633.

(*b*) *Rogers* v. *Payne*, 1 Wils. 376; *Reeves* v. *Brymer*, 6 Ves. 516; *Thomas* v. *Courtnay*, 1 B. & Ald. 1.

(*c*) Shep. Touchst. by Preston, 341.

(*d*) *Goman* v. *Salisbury*, 1 Vern. 240.

(*e*) *Noble* v. *Ward*, L. R. 2 Ex. 135.

accrued under such an agreement cannot be effectually released except by deed (*f*), unless it admit of a plea of accord and satisfaction (*g*).

Release given without consideration.

The rules above stated apply where the release of a mortgage debt is given for valuable consideration. Where, however, a mortgagee desires to release his debtor without consideration, he can only effectually do so at law by deed; for, otherwise, there would be a mere gratuitous promise by the mortgagee to forbear from exercising his rights of action to enforce payment, which, by an elementary rule of law, would not be binding on the releasor (*h*).

Release in equity by conduct.

But in equity the conduct of the parties or the circumstances of the transaction may aid an imperfect expression of release, or even, if there is no such expression, raise a presumption of intention to release the debt which will be carried into effect so as to discharge the security.

Promise not to enforce debt.

The mere declaration or promise by the creditor of his intention not to enforce a debt is not a release of the debt either at law or in equity, though many years have elapsed since the debt became due, and neither principal nor interest has ever been demanded (*i*).

The additional circumstance that the creditor, on the occasion of the insolvency of the debtor (his brother-in-law), promised to give up the instrument to be cancelled, but was unable to do so from having mislaid it, has been held not to alter the case (*k*); and even where a declaration of intention was actually accompanied by a delivery to the debtor of the mortgage deed by which the debt was secured, it was held that the release, being by parol and without consideration, was incomplete, and incapable of being enforced (*l*).

Cancellation of mortgage deed.

If, however, the mortgagee actually cancel the mortgage, it is

(*f*) *Langdon* v. *Stokes*, Cro. Car. 383. See also *Treswaller* v. *Keyne*, Cro. Jac. 620.

(*g*) *Willoughby* v. *Backhouse*, 3 B. & C. 821; *Baylis* v. *Usher*, 4 Moo. & P. 791.

(*h*) See *Re Hancock, Hancock* v. *Berry*, W. N. (1888) 138; 57 L. J. Ch. 793. And see *Foakes* v. *Beer*, 9 App. Ca. at p. 612.

(*i*) *Cross* v. *Sprigg*, 2 Mac. & G. 113; *Reeves* v. *Brymer*, 6 Ves. 516; *Jordan* v. *Money*, 5 H. L. C. 185; *Re Pink*, (1912) 1 Ch. 498; *Re Tinline* (1912), 56 S. J. 310.

(*k*) *Cross* v. *Sprigg*, *sup.*

(*l*) *Re Hancock, Hancock* v. *Berry*, W. N. (1888) 138; 57 L. J. Ch. 793; cf. (1896) 2 Ch. 157.

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as much a release as cancelling a bond, if done with intent to release, and will effectually discharge the security (*m*).

Where debtor has altered his position on faith of declaration of intent to release.

A fortiori, a declaration of intention may operate as an effectual release, especially when accompanied by destruction or delivery up of the mortgage, if the debtor, on the faith of such declaration, have done acts which have altered his position: for such acts may supply a sufficient consideration to support the release (*n*). So, such a declaration, accompanied with the destruction of the instrument securing the debt, was held sufficient in a case of father and son, where the relinquishment by the father of the debt formed part of the consideration of an assignment of the son's property in trust for creditors, but under which the father agreed to be satisfied with the surplus which should remain after paying the other creditors (*o*). And where executors holding, as part of their testator's estate, an equitable charge not under seal on a policy of life assurance gave up the security to the debtor, and signified in writing their intention of releasing the debt, on condition of his paying the probate and legacy duty on the debt, which he did, it was held that the payment was a good consideration for the release, and that the debt was released (*p*).

A declaration by the obligee of a bond of an intention to release the debt has been held effectual, under circumstances where it would have been fraudulent on the part of the executor of the obligee to put the bond in suit (*q*).

Evidence of intention to release debt.

Where the object of a bond, executed by a son to his father on payment of the debt of the former by the latter, and deposited with trustees, appeared to have been intended not to secure a debt, but as a check on the conduct of the son, it was held in equity, on the death of the father, that, the object of the bond being satisfied, it ought to be cancelled, and that the son should not be affected by the neglect of the trustees to cancel the bond, as they had power to do, under the trust, within a limited time (*r*); and evidence has been allowed to be drawn from

(*m*) *Harrison* v. *Owen,* 1 Atk. 520; *Gummer* v. *Adams,* 13 L. J. Ex. 40.

(*n*) *Yeomans* v. *Williams,* L. R. 1 Eq. 184. See *Exp. Douglas,* 3 D. & C. 310.

(*o*) *Gilbert* v. *Wetherell,* 2 S. & St. 254.

(*p*) *Taylor* v. *Manners,* L. R. 1 Ch. 48. See *Richards* v. *Syms,* Barn. Ch. R. 90.

(*q*) *Wekett* v. *Raby,* 2 Bro. P. C. 386.

(*r*) *Flower* v. *Marten,* 2 My. & Cr. 459.

entries in the creditor's books, and from a letter written to a third party in which he declared that he had released the debt, in aid of parol declarations of his intention so to do (*s*); and in one case a mere entry by the creditor in his books, of his intention not to sue the debtor unless he was himself distressed, was held to operate as a conditional release (*t*); but this case, it seems, fell within the principle of the decision in *Wekett* v. *Raby*, viz., fraud (*u*).

Appointment of debtor as executor of creditor's will.

The mere appointment of a debtor as executor will amount to a release at law, though he has not proved the will (*x*); but such appointment is not sufficient of itself to annul the debt in equity (*y*). So where a testator left a letter of instructions to an executor, which was not communicated to him during the testator's lifetime, nor executed as a will, stating that a debt from the executor was cancelled, it was held that the letter was not admissible as evidence of intention to release the debt, and that the debt was payable (*z*). In order that the equitable claim of the residuary legatee against a debtor to the estate who is appointed executor may be rebutted, the intention of the testator to forgive the debt during his lifetime must be proved (*a*).

Presumption of intention to release.

It would seem that an intention to release will more readily be presumed where the interest only and not the principal is alleged to have been released; for where the principal is alleged to have been released, the transaction is always open to the observation that if such had been the intention the creditor would have delivered up his security (*b*).

Partial release.

A release of past interest will not, of course, operate as a discharge of the security so far as relates to the principal and future interest; and a release of part of the principal will leave the whole of the property comprised in the security charged with the unpaid balance of the principal and the interest thereon (*c*).

(*s*) *Eden* v. *Smyth*, 5 Ves. 341. And see *Reeves* v. *Brymer*, 6 Ves. 518.

(*t*) *Aston* v. *Pye*, 5 Ves. 350, at p. 354, n.

(*u*) Per Wigram, V.-C., 18 L. J. Ch. 206.

(*x*) *Strong* v. *Bird*, L. R. 18 Eq. 315; *Re Applebee*, *Leveson* v. *Beales*, (1891) 3 Ch. 422.

(*y*) *Selwin* v. *Brown*, 3 Bro. P. C. 386; *Re Pink*, (1912) 1 Ch. 498.

(*z*) *Re Hyslop*, *Hyslop* v. *Chamberlain*, (1894) 3 Ch. 522.

(*a*) *Strong* v. *Bird*, L. R. 18 Eq. 315; *Re Applebee*, *Leveson* v. *Beales*, (1891) 3 Ch. 422; *Re Pink*, *sup.*

(*b*) *Yeomans* v. *Williams*, L. R. 1 Eq. 184. See *Cross* v. *Sprigg*, 6 Ha. 556.

(*c*) Story on Bailments, s. 301. As to partial release of lien, see *Kettlewell* v. *Watson*, 21 Ch. D. 685.

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ii. Acceptance of Part of Debt in satisfaction of the Whole. It has been seen that, in determining whether a release of the debt should be by deed or not, the question of consideration is material. The acceptance of part of a debt, being a sum certain, though expressed to be in full of all demands, is not an extinguishment of the original debt, even if the debtor undertakes to pay the residue when of ability (*d*). To amount to an acquittance from the larger debt, there must be a release or acknowledgment of satisfaction by deed, or some consideration or possibility of benefit to the creditor relinquishing his further claim, as if the creditor receive payment of the lesser sum at an earlier time, or at a place more convenient to him (*e*).

Original debt not discharged by partial payment, unless debt is released, or creditor receives a benefit.

So the acceptance of a chattel, irrespective of its money value, in satisfaction, is good, from the possibility of the latter being more beneficial to the creditor than the debt (*f*), although it seems that the bettering the creditor's case is not, in all cases, sufficient to effect a release of the larger debt, thus a bond with sureties, though more advantageous than a single bond, will not be deemed a satisfaction for the larger sum secured by the latter (*g*).

Conditional satisfaction of mortgage.

If the agreement to accept part of a debt in satisfaction of the whole is upon condition, the condition must be strictly observed or the original debt will revive. So where a mortgagee agreed to take a less sum than what was due in lieu of the whole, provided that such sum was paid on a given day, and payment was not made on that day, it was held that the mortgagee was entitled to recover the whole of the original debt, and that equity would not relieve, as on a penalty, against the effect of non-payment on that day (*h*).

Giving negotiable security for part of debt in satisfaction of whole.

The giving of a negotiable instrument may operate, if so given and taken, in satisfaction of a debt of greater amount; the circumstance of negotiability making it, in fact, a different thing, and more advantageous than the original debt, which was not negotiable (*i*).

(*d*) *Pinnell's Case*, 5 Rep. 117; *Fitch* v. *Sutton*, 5 East, 230; *Adams* v. *Taylor*, 4 Mod. 88.

(*e*) Co. Lit. 212 b; *Pinnell's Case*, *sup.* See *Wilkinson* v. *Clark*, L. R. 2 Ch. 542, 547; *Fowkes* v. *Beer*, 9 App. Ca. 605; *Underwood* v. *Underwood*, (1894) P. 204.

(*f*) *Pinnell's Case*, *sup.*; *Jones* v. *Sawkins*, 17 L. J. C. P. 92.

(*g*) 1 Brownl. 47, 71; 2 Roll. Abr. 470.

(*h*) *Ford* v. *Earl of Chesterfield*, 19 Beav. 428; *Parry* v. *Great Ship Co.*, 4 B. & S. 556, *Thompson* v. *Hudson*, L. R. 4 H. L. 1.

(*i*) *Sharp* v. *Payne*, 15 M. & W. 26; *Bubbier* v. *Snaljes*, 37 Ch. D. 406, C. A.

Effect where partial security fails.

The mortgagee's security does not cease by the mere payment of the debt by bills of exchange or cheques which are afterwards dishonoured, and he retains his right of foreclosure (*k*). And even if he has reconveyed, he would still, it seems, retain a lien on the estate for his debt (*l*).

(*k*) *Teed* v. *Carruthers*, 2 Y. & C. C. C. 31.

(*l*) *Grant* v. *Mills*, 2 V. & B. 306; *Frail* v. *Ellis*, 16 Beav. 351.

CHAPTER LXI.

THE DISCHARGE OF THE SECURITY BY RELEASE OF THE MORTGAGED PROPERTY.

SECTION I.

RECONVEYANCES AND DELIVERY OF POSSESSION.

Effect of release of property.

i.—By what means Mortgaged Property may be Released.—A mortgage security may also be discharged by a release of the property comprised in the mortgage.

Reconveyance of freeholds or leaseholds.

The proper and formal mode of releasing freeholds or leaseholds which have been conveyed by way of legal mortgage is by a deed of reconveyance (*a*); and the legal estate cannot generally be revested in the mortgagor otherwise (*b*). But unless the mortgagee is or has been in possession, he may be compelled to convey to any third person as the mortgagor directs (*c*). Property comprised in a mere equitable charge will be effectually released by a receipt in writing for the money due upon the mortgage (*d*). It is conceived that this rule would apply even to a formal puisne mortgage where the legal estate is outstanding in the first mortgagee (*e*): it is usual, however, in such a case, as also generally where an equitable charge is created by deed, to take a formal deed of reconveyance or release.

Copyholds.

Where the property comprised in a mortgage consists of copyholds, and the mortgagee has not actually been admitted, on payment of the money the mortgagor may re-enter of his old estate without admittance; it will be sufficient to enter up satisfaction on the court rolls, for which purpose a warrant

(*a*) See *Weeks* v. *Stourton*, 11 Jur. N. S. 278.

(*b*) *Harrison* v. *Owen*, 1 Atk. 519. See Dav. Prec. Conv. vol. ii. pt. 2, pp. 276 *et seq.*

(*c*) *Post*, pp. 1434, 1439.

(*d*) But see *Re Moore and Hulm*, *inf.*

(*e*) See Key & Elph. (6th ed.) vol. ii. p. 248. The receipt does not, it seems, require a stamp. See Dav. Conv. vol. ii. pt. 2, p. 302.

should be given to the steward of the manor, and thereupon the conditional surrender will be at an end (*f*). If the mortgagee has been admitted, a re-surrender to the mortgagor and his re-admittance will be necessary (*g*). In either case a receipt for the money should be indorsed on the deed of covenants accompanying the conditional surrender.

Mortgage by demise.

Where the mortgage, whether of freeholds or leaseholds, is of a term of years, the reconveyance may be effected by surrender of the term. So where the mortgage is by sub-demise the reconveyance must be by surrender even though it is a second mortgage by sub-demise (*h*).

Reconveyance under Lands Clauses Act.

In the Lands Clauses Act (*i*), special provisions are contained for redeeming mortgages affecting lands purchased under the powers of the Act, which enable the company purchasing, on refusal of the mortgagee to convey, or on his default in making a good title, to pay the money into Court, and execute to themselves a deed poll, which is to operate as a conveyance.

The fact that the company have taken possession as against the mortgagor does not preclude them from serving notice to treat on the mortgagee (*k*).

Mortgages to building and friendly societies effectually reconveyed by statutory receipt.

In the case of a mortgage to a building society (*l*), or to a friendly society (*m*), no reconveyance or surrender is necessary, as a receipt in the form prescribed by statute, indorsed on or annexed to the mortgage deed, is sufficient to vest the mortgaged property in the person for the time being entitled to the equity of redemption.

Land Transfer Act, 1875.

Where a registered charge is created on any land under the Land Transfer Act, 1875 (*n*), it is enacted by sect. 28:—

"The registrar shall on the requisition of the registered proprietor of any charge, or on due proof of the satisfaction thereof, notify in the prescribed manner, by cancelling the original entry or otherwise, the cessation of the charge, and thereupon the charge shall be deemed to have ceased."

(*f*) 1 Watk. Cop. (4th ed.) p. 148. See *Burgaine* v. *Spurling*, Cro. Car. 283; *Hopkinson* v. *Chamberlain*, (1908) 1 Ch. 853.

(*g*) *Fawcet* v. *Lowther*, 2 Ves. Sen. 300. See Gilb. Ten. 176.

(*h*) *Re Moore and Hulm*, (1912) 2 Ch. 105.

(*i*) 8 & 9 Vict. c. 18, ss. 108, 109.

(*k*) *Cooke* v. *London C. C.*, (1911) 1 Ch. 604.

(*l*) 37 & 38 Vict. c. 42, s. 42. See *Fourth City Building Soc.* v. *Williams*, 14 Ch. D. 140. And see *ante*, p. 578.

(*m*) 38 & 39 Vict. c. 60, s. 16. See *ante*, p. 585.

(*n*) 38 & 39 Vict. c. 87; *ante*, p. 48.

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By sect. 19, notice of an incumbrance entered on the register may be cancelled in a similar way. Both these sections apply to part discharges (*o*).

A purchaser under a power of sale in a registered mortgage is entitled to have the mortgage removed from the register without the consent of the mortgagor (*p*).

Ireland.

This Act does not apply to Ireland (*q*). But by the Local Registration of Title Act, 1891 (*r*), which provides that charges of land registered under that Act shall operate as mortgages by deed, it is enacted that—

Discharge of registered charge.

Sect. 42. "(1.) The registering authority shall at the request of the registered owner of a charge on land, or on proof in such manner as is hereinafter mentioned, or in such other manner as may be prescribed, of the satisfaction of a charge or of any part of a charge on land, or of the release of any part of registered land from a registered charge, note the satisfaction or release on the register, and thereupon the charge shall, to the extent so noted, cease to operate.

"(2.) For the purposes of this section, the receipt of the registered owner for the time being of a charge shall be sufficient proof of the satisfaction of the charge, or of any part of the charge, and a release signed by the registered owner for the time being of a charge shall be sufficient proof of the release of any part of registered land subject to that charge."

Mortgages of land in Ireland not falling within the last mentioned Act are effected by deed in the usual manner; but, as has been seen, a memorial of the mortgage must be registered to ensure priority. With regard to such mortgages, it is enacted by the Record of Title Act, Ireland, 1865 (*s*), that—

Entry of payment of charge to be noted, and release to be unnecessary.

"On the application of any recorded owner or incumbrancer, and on finding that any charge, incumbrance, or claim upon a recorded estate has been paid off or satisfied, the officer may make an entry of the fact on the record, and no release or reconveyance shall in that case be necessary."

Mortgage of ships.

Where a registered mortgage of a ship is discharged, an entry on the register book to that effect vests the mortgagee's estate in the person in whom, having regard to intervening circumstances, it would have vested but for the mortgage (*t*).

(*o*) 60 & 61 Vict. c. 65, Sch. I.; and see Rule 166 and Form 48.
(*p*) *Re Winter*, L. R. 15 Eq. 156.
(*q*) 38 & 39 Vict. c. 87, s. 2.
(*r*) 54 & 55 Vict. c. 66.
(*s*) 28 & 29 Vict. c. 88, s. 44.
(*t*) 57 & 58 Vict. c. 60, s. 32, set out *ante*, p. 285.

A bill of sale of chattels is vacated without re-assignment by a memorandum of satisfaction written upon a registered copy of the bill (*u*). Bill of sale of chattels.

A legal mortgage of lands situate in a register county in England cannot be effectually released so as to revest the property in the mortgagor except by a deed of reconveyance, a memorial of which should be deposited in the registry of that county. Land in register counties.

The Yorkshire Registry Acts (*x*) merely provide for the registration by memorial of all assurances, including charges, by which lands in any of the three ridings are affected; but neither of these Acts contains any special provision with regard to the satisfaction and discharge of mortgages or other charges. Yorkshire.

With regard to mortgages of land in Middlesex, it is enacted by the Middlesex Registry Act, 1708 (*y*), as follows:— Middlesex.

"That in case of mortgages whereof memorials shall be entered in the said register office pursuant to this Act, if at any time afterwards a certificate shall be brought to the said registrars or masters, signed by the mortgagee or mortgagees in such mortgage, his, her, or their executors, administrators or assigns, and attested by two witnesses, whereby it shall appear that all moneys due upon such mortgage have been paid or satisfied in discharge thereof, which witnesses shall, upon their oaths before the said registrars or masters, or before a master in Chancery, ordinary or extraordinary (who are hereby respectively empowered to administer such oath), prove such moneys to be satisfied or paid accordingly, and that they saw such certificate signed by the said mortgagee or mortgagees, his, her, or their executors, administrators or assigns, that then, and in every such case, the said registrars or masters shall make an entry in the margins of the said register books against the registry of the memorial of such mortgage that such mortgage was satisfied and discharged according to such certificate to which the same entry shall refer, and shall after file such certificate to remain upon record in the said register office." Proceedings and entries in case of mortgage satisfied.

And by sect. 5 of the Land Registry (Middlesex Deeds) Act, 1891 (*z*), it is enacted that—

"Except on the application of the mortgagee named in the mortgage, his executors or administrators, it shall not be necessary to Discharge of mortgages.

(*u*) See *ante*, p. 268.

(*x*) 47 & 48 Vict. c. 54, ss. 4, 7, 18; 48 & 49 Vict. c. 26.

(*y*) 7 Ann. c. 20, s. 17. As to registration under this Act, see 63 & 64 Vict. c. 26, s. 4, *ante*, p. 1267.

(*z*) 54 & 55 Vict. c. 64.

note on the register the discharge of a mortgage in any other manner than by the registering a memorial of the instrument of discharge."

When mortgagee is bound to reconvey.

ii.—**Right of Mortgagor to Reconveyance.**—On being actually paid off, but not before, the mortgagee is, as a general rule, bound to reconvey the mortgaged property (*a*).

But a mortgagor is not justified in tendering the amount due and at the same time requiring the immediate execution of a reconveyance then produced for the first time (*b*). Nor is the mortgagee justified in insisting that the mortgagor must execute the deed first (*c*).

Mortgage of trust fund.

The mortgagee is entitled only to the amount due on the mortgage; so the mortgagee of a trust fund cannot compel the trustees to pay over the trust fund to him (*d*).

Mortgagee cannot deny mortgagor's title.

The mortgagee is bound to reconvey the estate to the mortgagor or those deriving title under him, and is estopped from denying the mortgagor's title. This rule is thus stated by Lord Cottenham, C. (*e*):—"A mortgagee can never refuse to restore to his mortgagor, or those who claim under him, upon repayment of what is due upon the mortgage, the estate which became vested in him as mortgagee. To him it is immaterial, upon repayment of the money, whether the mortgagor's title was good or bad. He is not at liberty to dispute it any more than a tenant is at liberty to dispute his landlord's title."

Incorrect recitals.

The mortgagee cannot be compelled to execute a reconveyance if it contain incorrect recitals; but if there are no recitals at all, he must execute it at the peril of costs (*f*).

Notice of prior equity.

A mortgagee is not bound to assign the estate to the mortgagor or his nominee if he has notice of an equitable claim by another person on the estate (*g*), and he may refuse to reconvey the legal estate without the consent of such person (*h*).

So if a mortgagor pays the mortgage debt to the mortgagee

(*a*) *Cox* v. *Coffin*, 9 Mod. 120; *Lacey* v. *Waghorne*, 59 L. T. 208. See *Crosse* v. *General Reversionary, &c. Co.*, 3 De G. M. & G. 698.

(*b*) *Wilshire* v. *Smith*, 3 Atk. 89; *Rourke* v. *Robinson*, (1911) 1 Ch. 480; *Webb* v. *Crosse*, (1912) 1 Ch. 323.

(*c*) *Edmondson* v. *Copland*, (1911) 2 Ch. 301.

(*d*) *Re Bell, Jeffery* v. *Sayles*, (1896) 1 Ch. 1, C. A.; *Hockey* v. *Western*, (1898) 1 Ch. 350, C. A.; *ante*, p. 325.

(*e*) *Tasker* v. *Small*, 3 My. & Cr. 63, at p. 70.

(*f*) *Hartley* v. *Burton*, L. R. 3 Ch. 365.

(*g*) *Corbett* v. *Nat. Prov. Institution*, 17 T. L. R. 5.

(*h*) *Banks* v. *Whittall*, 1 De G. & S. 542.

with notice of an equitable claim against the latter he may become liable to such claim (*i*).

Where redeeming party has only a partial interest.

A mortgagee is not bound to convey the legal estate in the mortgaged property and to deliver up the title deeds to a person from whom he has accepted payment of principal, interest, and costs, if that person has only contracted to purchase a part of the mortgaged estate and has not accepted the title. On payment by a person having a partial interest giving a right to redeem, the mortgagee is bound to convey; but the conveyance should reserve the equities of the other persons interested (*k*).

Form of reconveyance.

Whenever circumstances will permit, a reconveyance should be made by indorsement, not only for the sake of brevity, but in order that when the mortgage deed is produced it shall necessarily bear with it the evidence of the reconveyance, for otherwise the reconveyance may be lost, and great difficulty may be found in proving that the debt was ever paid. As the execution of the reconveyance is the natural and necessary consequence of the mortgage debt being discharged, it should not, when indorsed, and when there have been no intermediate dealings with the title, contain any recitals, but should merely reconvey the estate in consideration of the money (*l*).

The mortgagee usually reconveys "as mortgagee," implying a covenant that he has done no act to incumber by virtue of the Conveyancing Act, 1881 (*m*); and the third schedule to that Act contains a form of reconveyance intended for use on reconveyance of a statutory mortgage, but which is applicable, with slight modification, on reconveyance of a mortgage made in the usual form.

Words of limitation.

A reconveyance, like any other assurance, must contain proper words of limitation, otherwise the legal estate will not pass. So where a reconveyance was to a mortgagor "in fee," omitting the word "simple," only a legal estate for life passed under the deed (*n*).

Presumption of reconveyance after lapse of time.

After a considerable lapse of time, during which the mortgagor or those claiming under him have dealt with the estate as if they were the legal owners, and the mortgage deeds have

(*i*) *Berwick* v. *Price*, (1905) 1 Ch. 632.

(*k*) *Pearce* v. *Morris*, L. R. 5 Ch. 227. See *Kinnaird* v. *Trollope* (No. 1), 39 Ch. D. 636.

(*l*) Dav. Conv. (4th ed.), vol. ii. pt. 2, pp. 278, 279. As to reconveyance of a statutory mortgage, see 44 & 45 Vict. c. 41, s. 29.

(*m*) 44 & 45 Vict. c. 41, s. 7.

(*n*) *Re Ethel and Mitchell*, (1901) 1 Ch. 945.

been in their possession, a conveyance of the legal estate will be presumed, even as against a purchaser in a suit to enforce specific performance (*o*).

Where the original possession is accounted for, a conveyance or reconveyance is not to be presumed from length of possession, unless the jury are satisfied that it had actually been executed (*p*).

Cancellation of mortgage.

If a mortgage is found cancelled in the possession of the mortgagee, it may operate, like the cancelling of a bond, as a release of the debt; but it does not convey or re-vest the estate in the mortgagor, for that must be done by deed (*q*).

In *Houghton* v. *Houghton* (*r*), Sir J. Romilly, M.R., said that his impression was that, where a mortgage deed was by a competent Court declared void and cancelled, a reconveyance was unnecessary.

Reconveyance fraudulently obtained.

Where the mortgagee executed a release on the faith of getting proper securities in substitution for the mortgage, and the substituted securities turned out to be forgeries, he was restored to his original position (*s*), without prejudice to the rights of persons who were alleged to have lent money on the faith of the release (*t*).

But, if after a release has been fraudulently obtained, another security is made under which the estate is sold, it cannot be followed in the hands of a purchaser for value without notice (*u*).

Mortgagee generally bound to deliver deeds.

iii.—Right of Mortgagor on Redemption to Re-delivery of Deeds.—On redemption, the mortgagee must, as a general rule, deliver up all the title deeds to the mortgagor, including all that have been executed between the original mortgage and the redemption (*x*), and all copies of the mortgage or deed of transfer (*y*). But he cannot be compelled to hand over the deeds to the mortgagor if he has notice of subsequent mortgages which have not been paid off (*z*). The mortgagee is not entitled,

(*o*) *Cooke* v. *Soltau*, 2 S. & St. 154; *Sands* to *Thompson*, 22 Ch. D. 614. But see *Dowling* v. *Ford*, 11 M. & W. 329; and *Bennett* v. *Cooper*, 9 Beav. 252.

(*p*) *Doe* v. *Reed*, 5 B. & Ald. 238.

(*q*) *Harrison* v. *Owen*, 1 Atk. 520.

(*r*) 15 Beav. 278, 321.

(*s*) *Eyre* v. *Burmester*, 10 H. L. C. 90; *ante*, p. 1323.

(*t*) *Ibid.*; *Scholefield* v. *Templer*, 4 De G. & J. 429.

(*u*) *Eyre* v. *Burmester*, 4 De G. J. & S. 435.

(*x*) *Hudson* v. *Malcolm*, 10 W. R. 720.

(*y*) *Re Wade*, 17 Ch. D. 348.

(*z*) *Corbett* v. *National Prov. Institution*, 17 T. L. R. 5; *ante*, p. 1434.

in the absence of express agreement, to retain the deeds to answer contingent liabilities of the mortgagor (*a*).

Settlement of mortgage debt.

This rule will apply even where the mortgagee has settled his mortgage and transferred it by the same deed on the trust of the settlement; in one case, however, by consent, the custody of the deeds relating to the settlement was retained by the mortgagees, they covenanting for production at their own expense (*b*).

Several mortgages on distinct estates.

Where several mortgages upon distinct estates have been transferred by a single deed, one of the mortgagors who comes to redeem singly is entitled to have the deed of transfer delivered to him upon his undertaking to produce it (*c*).

Where mortgagee reconveys only part of estate.

Where the mortgagee reconveys only part of the estate, and is entitled to retain the deeds by virtue of his title to the remainder of the property, he ought also to covenant with the redeeming party for production, or acknowledge his right thereto (*d*).

Purchaser's right to deeds.

When the estate has been sold in a suit, and the money has been paid into a general account, the purchaser is entitled to insist upon the delivery to him of the title deeds before any dealings take place with the purchase-money (*e*).

Affidavit of documents.

It is usual for the mortgagee to be prepared with an affidavit of the documents to be delivered up in case of redemption, and the mortgagor may require the affidavit at his own expense; but he should give previous notice to the mortgagee of his intention, and in case of his neglect to do so and of the non-production of the affidavit, a new day must be fixed for payment (*f*).

Retention of deed as security for further advance.

Where the legal mortgage deed was retained by the first mortgagee after payment, and a subsequent mortgage made to a third party, and subsequent advances by the first mortgagee, the third party was held entitled to a reconveyance from the first mortgagee, but the latter was held entitled to retain the deed (*g*).

Delivery to mortgagor after notice of charge.

W., holding title deeds to secure a debt due by N., received a letter from N., directing him, out of the sale of the property, to

(*a*) *Merchant's Bank of London* v. *Maud*, 18 W. R. 312.

(*b*) *Dobson* v. *Land*, 4 De G. & S. 575. As to statutory acknowledgments in lieu of such covenants, see 44 & 45 Vict. c. 41, s. 9, *ante*, p. 841.

(*c*) *Capper* v. *Terrington*, 1 Coll. 103.

(*d*) *Yates* v. *Plumbe*, 2 Sm. & G. 174.

(*e*) *Fowler* v. *Scott*, 25 L. T. 784.

(*f*) *Weeks* v. *Stourton*, 11 Jur. N. S. 278.

(*g*) *Young* v. *Whitchurch Banking Co.*, 37 L. J. Ch. 186.

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pay himself and a debt due from N. to S., whose solicitor W. was. W. recovered from N. payment of his own debt, and without the consent of S. delivered the deeds to N. It was held that W. was liable to S. for any loss he might sustain (*h*).

Loss of deeds by mortgagee.

The rights and liabilities of the parties where the title deeds have been lost or are not forthcoming, have been already explained (*i*).

Assignment of share.

On the distribution of a trust fund where a share has been assigned, the trustee cannot require delivery of the assignment or other title deeds before payment of the share (*k*).

Lien of solicitor on deeds.

The mortgagor's right to delivery to him of the title deeds on redemption is liable to be intercepted by the lien of a solicitor employed in the transaction in respect of his costs of and incident to the same (*l*).

Mortgagee's solicitor.

The mortgagee's solicitor cannot, as against the mortgagor, claim a lien for costs of and incident to the mortgage transaction beyond the costs properly payable by the mortgagor (*m*). The

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rule is thus laid down in a recent case (*n*): "When the mortgagor has paid to the mortgagee all that is due to him for principal, interest, and costs, and the mortgagee has given the mortgagor a release, the mortgagee's solicitor has no right to retain the deeds against the mortgagor, even for costs due to the solicitor from the mortgagee for work done relating to the mortgaged property pending the mortgage. The equitable right of the mortgagor to have back from the mortgagee his deeds, on payment of principal, interest, and costs, prevails against the solicitor's lien claimed in right of the mortgagee."

No lien for costs of solicitor-mortgagee.

Where a solicitor is in possession of deeds of his client as mortgagee, he does not acquire a lien thereon for his general costs (*o*), or for the costs of the mortgage deed; the mortgage deed is his own, not the client's (*p*).

No lien for costs of abortive mortgage.

A solicitor cannot, of course, derive a lien from a party who has no right himself, or further than the right of such party

(*h*) *Attwood* v. ——, 5 Russ. 149.
(*i*) *Ante*, pp. 841 *et seq.*
(*k*) *Re Palmer*, (1907) 1 Ch. 486.
(*l*) See further as to solicitors' liens on deeds, &c., *ante*, p. 1405.
(*m*) *Wakefield* v. *Newbon*, 6 Q. B. 276.
(*n*) Per Chitty, J., in *Re Llewellin, A Solicitor*, (1891) 3 Ch. 145, 148, where *Ogle* v. *Storey* is considered. See *Re Dee Estates*, W. N. (1911) 100.
(*o*) *Pelly* v. *Wathen*, 1 De G. M. & G. 16; *Vaughan* v. *Vanderstegen*, 2 Drew. 410.
(*p*) *Sheffield* v. *Eden*, 10 Ch. D. 291, C. A.

extends (*q*). If, therefore, on an intended mortgage, the deeds are received from the intended mortgagor and delivered by the proposed mortgagee to his solicitor to examine the title, and the mortgage goes off, the solicitor will not have a lien for his bill of costs (*r*).

Deeds deposited by mortgagee with solicitor.

The solicitor of the mortgagor having a lien for the costs of preparing the mortgage, does not lose the lien by holding the title deeds for the mortgagee, and, upon a sale of the equity of redemption by the trustee in liquidation of the mortgagor, is entitled to retain his costs of and incident to the mortgage out of the purchase-money (*s*).

But where deeds are deposited by a mortgagee with his solicitor for safe custody, the possession of the solicitor is that of his client, the mortgagee; and his lien on the deeds, as against the mortgagor, does not cover costs of dealings with the mortgaged property, not referable to the mortgage transaction, in which the mortgagor employs the same solicitor (*t*).

iv.—Right of Mortgagor to require Transfer of Mortgage instead of Reconveyance.—Formerly, a mortgagee could not have been compelled to assign the security on redemption either by the mortgagor or a third person, or on payment of the mortgage moneys by a purchaser out of the proceeds of sale of the property; he was in strictness only bound to reconvey to the owner of the equity of redemption (*u*). Now, however, a mortgagee, not being or having been in possession, can be compelled to execute an assignment instead of a reconveyance on being paid off, notwithstanding any stipulation to the contrary. On this point the Conveyancing Act, 1881 (*x*), enacts as follows:—

Obligation on mortgagee to transfer instead of reconveying.

Sect. 15.—"(1) Where a mortgagor is entitled to redeem, he shall, by virtue of this Act, have power to require the mortgagee, instead of reconveying, and on the terms on which he would be bound to reconvey, to assign the mortgage debt and convey the mortgaged property to any third person, as the mortgagor directs; and the mortgagee shall, by virtue of this Act, be bound to assign and convey accordingly.

(*q*) *Hollis* v. *Claridge*, 4 Taunt. 807; *Turner* v. *Letts*, 20 Beav. 185.
(*r*) *Pratt* v. *Vizard*, 5 B. & Ad. 808.
(*s*) *Exp. Calvert, Re Messenger*, 3 Ch. D. 317; *Colmer* v. *Ede*, 40 L. J. Ch. 185.
(*t*) *Exp. Fuller*, 16 Ch. D. 617. See *Exp. Quinn, Re Nicholson*, 53 L. J. Ch. 302; *Macfarlane* v. *Lister*, 37 Ch. D. 88.
(*u*) *Smith* v. *Green*, 1 Coll. 563; *Dunstan* v. *Patterson*, 2 Ph. 341.
(*x*) 44 & 45 Vict. c. 41.

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"(2.) This section does not apply in the case of a mortgagee being or having been in possession.

"(3.) This section applies to mortgages made either before or after the commencement of this Act, and shall have effect notwithstanding any stipulation to the contrary."

Reconveyance on mortgage.

And by the Conveyancing Act, 1882 (*y*), it is enacted that:—

Sect. 12. "The right of the mortgagor, under section fifteen of the Conveyancing Act of 1881, to require a mortgagee, instead of reconveying, to assign the mortgage debt and convey the mortgaged property to a third person, shall belong to and be capable of being enforced by each incumbrancer, or by the mortgagor, notwithstanding any intermediate incumbrance; but a requisition of an incumbrancer shall prevail over a requisition of the mortgagor, and, as between incumbrancers, a requisition of a prior incumbrancer shall prevail over a requisition of a subsequent incumbrancer."

Equitable mortgagor may require mortgagee to transfer.

As "mortgage," for the purposes of these Acts, includes any charge on any property for securing money or money's worth, an equitable mortgagor may require a transfer of the mortgage instead of a reconveyance (*z*).

Charge on shares in company.

The right of a mortgagor to require a transfer applies to the case of a lien of a company on shares for a debt due from a shareholder (*z*). But, *quære*, whether the section applies to a building society mortgage (*a*).

Where mortgagor is trustee for other persons.

The transfer must be on the "terms" on which the mortgagee would be bound to reconvey; and, accordingly, if the mortgagor's position is such as to constitute him a trustee of the property upon the trusts of a settlement, he cannot require an absolute transfer to his nominee (*b*). The words "the terms" mean the terms generally, and not merely as to the amount of money payments (*c*).

Whether transfer to stranger can be directed in foreclosure action.

In one case (*d*) a doubt was expressed by the learned judge whether, in a foreclosure action, an assignment to a person outside the action would be allowed instead of reconveyance; but this dictum was not necessary for determination of any point which had actually arisen, and, if generally adopted, would seem to be inconsistent with the right given by sect. 15 to require a transfer to any third person; and a decision to

(*y*) 45 & 46 Vict. c. 39.
(*z*) *Everitt* v. *Automatic Weighing Machine Co.*, (1892) 3 Ch. 506.
(*a*) *Re Rumney and Smith*, (1897) 2 Ch. 351, C. A.
(*b*) *Alderson* v. *Elgey*, 26 Ch. D. 567.
(*c*) *Ibid.* p. 573.
(*d*) *Smithett* v. *Hesketh*, 44 Ch. D. 161, 165.

the effect of this dictum would materially narrow the advantage of the enactment.

Whether the right exists where there are puisne incumbrancers

It was held under sect. 15 of the Act of 1881 that the mortgagor has no right to call for a transfer when there is a second mortgagee who, on redeeming, would be entitled to require a conveyance (*e*). This rule has been incidentally recognized in a later case as still in force notwithstanding sect. 12 of the Act of 1882 (*f*). Indeed, the effect of this section seems to be to give legislative confirmation to the decision in the earlier case, so far as it laid down that the expression "mortgagor" in the principal Act means the person who has, in priority to all other persons interested, the right to call upon the first mortgagee to transfer the mortgage; but to leave unaffected that decision so far as it laid down the rule that the consent of a mesne incumbrancer is still necessary to enable a subsequent incumbrancer or the mortgagor, as the case may be, to call for a transfer instead of a reconveyance (*g*).

A legal mortgagee who has received notice of subsequent equitable mortgages cannot on being paid off by the mortgagor be compelled to hand over to him the title deeds and execute a reconveyance until he is satisfied that the subsequent equitable mortgages have been paid off (*h*).

Enforcement of right to transfer instead of reconveyance.

The proper mode of enforcing a mortgagor's right to a transfer instead of a reconveyance is by means of an action to redeem, in which, on the plaintiff undertaking to pay the amount due upon the mortgagee transferring the charge to the nominee of the plaintiff, the mortgagee may be restrained from otherwise dealing with the security (*i*).

Exception of mortgagee in possession.

The reason why a mortgagee, being, or having been, in possession, is excepted from the operation of the enactments above referred to, is that a mortgagee who has taken possession remains accountable in respect of the profits and other matters even after transfer (*k*). And, accordingly, though the request of the mortgagor would, no doubt, debar him from calling

(*e*) *Teevan* v. *Smith*, 20 Ch. D. 724. See *Rhodes* v. *Buckland*, 16 Beav. 212; *Ramsbottom* v. *Wallis*, 5 L. J. (N. S.) Ch. 92.

(*f*) *Kinnaird* v. *Trollope* (No. 1), 39 Ch. D. 636.

(*g*) See *West London Commercial Bank* v. *Reliance Permanent Building Soc.*, 29 Ch. D. 954, C. A.

(*h*) *Corbett* v. *Nat. Prov. Institution*, 17 T. L. R. 5; *ante*, p. .

(*i*) *Everitt* v. *Automatic Weighing Machine Co.*, (1892) 3 Ch. 506.

(*k*) See *Hall* v. *Heward*, 32 Ch. D. 430, 435; *Re Prytherch*, *Prytherch* v. *Williams*, 42 Ch. D. 590. And see *ante*, p. 827.

the original mortgagee to account for the acts of the transferee, yet the liability might still be enforced by subsequent incumbrancers.

Section II.

Vesting Orders.

i.—Lunatic Mortgagees and Trustees.—Difficulties sometimes arise where a conveyance of the legal estate in mortgaged property is required, in consequence of the person in whom such legal estate is vested being lunatic, an infant, out of the jurisdiction, or unknown, and this difficulty has been met by vesting orders. The necessity for vesting orders, as regards freehold land, has, however, to a great extent been done away with by sect. 30 of the Conveyancing Act, 1881 (*l*), and the Land Transfer Act, 1897.

Power to make vesting orders under Trustee Act, 1850.

By the Trustee Act, 1850 (*m*), the Lord Chancellor was empowered to make vesting orders of lands or contingent rights in lands, of which, and also orders vesting the right to transfer or receive the dividends of stock or to sue for and recover any stock to which any lunatic or person of unsound mind was solely entitled upon trust or by way of mortgage, and, where the lunatic was entitled jointly with any other person or persons, orders vesting such rights, either in the person so jointly entitled, or in such person or persons together with any other person or persons.

Powers under Lunacy Act, 1890.

These provisions are repealed by the Lunacy Act, 1890 (*n*), except so far as they relate to Ireland (*o*); and by this Act, as amended by the Lunacy Act, 1908 (*p*), it is enacted as follows:—

Power to vest lands and release contingent right of

Sect. 135.—"(1.) When a lunatic is solely or jointly seised or possessed of any land upon trust or by way of mortgage, the High Court (*q*) may, by order, vest such land in such person or persons for such estate and in such manner as he directs.

(*l*) *Ante*, p. 866.
(*m*) 13 & 14 Vict. c. 60, ss. 3, 4, 26, 27.
(*n*) 53 Vict. c. 5.
(*o*) *Ibid.* s. 342, and 5th Sched.
(*p*) 8 Edw. VII. c. 47, s. 2.
(*q*) 1 & 2 Geo. V. c. 40, s. 1.

"(2.) When a lunatic is solely or jointly entitled to a contingent right in any land upon trust or by way of mortgage, the judge may by order release such hereditaments from the contingent right, and dispose of the same to such person or persons as the judge directs.

lunatic trustee or mortgagee.

"(3.) An order under sub-sections (1) and (2) shall have the same effect as if the lunatic had been sane, and if solely seised, possessed, or entitled as aforesaid had executed, or if jointly seised, possessed, or entitled as aforesaid with any other person or persons, he and such other person or persons had executed a deed conveying the land for the estate named in the order, or releasing or disposing of the contingent right.

"(4.) In all cases where an order can be made under this section the judge may, if it is more convenient, appoint a person to convey the land or release the contingent right, and a conveyance or release by such person in conformity with the order shall have the same effect as an order under sub-sections (1) and (2).

"(5.) Where an order under this section vesting any copyhold land in any person or persons is made with the consent of the lord or lady of the manor, such land shall vest accordingly without surrender or admittance.

"(6.) Where an order is made appointing any person or persons to convey any copyhold land, such person or persons shall execute and do all assurances and things for completing the assurance of the lands; and the lord or lady of the manor shall, subject to the customs of the manor and the usual payments, be bound to make admittance to the land, and to do all other acts for completing the assurance thereof, as if the persons in whose place an appointment is made were free from disability and had executed and done such assurances and things."

Vesting orders of lunatics' stock or choses in action.

By sects. 136 and 137 of the same Act, the judge in lunacy is empowered to make orders vesting the right to transfer stock and to sue for choses in action to which a lunatic is entitled, solely or jointly with other persons, as trustee or mortgagee, or as representative of a deceased trustee or mortgagee.

The provisions of these sections, except as to the events giving rise to the power of the Court, are virtually identical with those of sect. 35 of the Trustee Act, 1893, with regard to the vesting of stock and choses in action.

Transfer of mortgage.

The powers of the Act extend to cases where it is desired to transfer a mortgage vested in a lunatic (*r*).

By the Lunacy Act, 1911 (*s*), the powers of the judge in lunacy under sects. 135—143 of the Act of 1890 to make vesting and other orders shall, except so far as they relate

(*r*) *Re Nicholson*, 34 Ch. D. 663. (*s*) 1 & 2 Geo. V. c. 40, s. 1.

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to lunatic mortgagees not being also trustees, be transferred to and be exercisable by the High Court.

Sale in foreclosure action.

Where land subject to an equitable mortgage is sold in a foreclosure suit, the mortgagor who has become a lunatic is a trustee of the legal estate for the purchaser (*t*).

Vesting order where one trustee becomes lunatic.

Where one trustee becomes lunatic, an order in lunacy for the other trustee to transfer stock is sufficient, without appointment of a new trustee (*u*).

Power of sale.

The Court, in authorizing the committee to exercise a lunatic mortgagee's power of sale, will only direct him to sell, leaving the transfer of the legal estate to be effected by means of a vesting order (*v*); but an order to convey would probably now be made (*x*).

ii.—**Infant Mortgagees and Trustees.**—By sects. 57 and 58 of the Trustee Act, 1850 (*y*), now repealed, where any infant was seised or possessed of any lands, or contingent rights in lands, upon any trust or by way of mortgage, the Chancery Division of the High Court was empowered to make vesting orders of such lands or rights in such person and in such manner and for such estate as the Court might direct.

By sect. 26 of the Trustee Act, 1893 (*z*), where a trustee entitled to or possessed of any land, or entitled to a contingent right therein, either solely or jointly with any other person, is an infant, the High Court may make an order vesting the land, or releasing the contingent right, as the Court may direct.

And by sect. 35 of the same Act, where a trustee entitled alone or jointly with another person to stock or a chose in action is an infant, the Court may make a vesting order in respect of such stock.

Infant of unsound mind.

As the case of an infant of unsound mind is not excluded from the operation of this Act, it would seem that the jurisdiction given to the High Court by the above section is exercisable in such a case (*a*).

Infant heir of mortgagor.

In a foreclosure action of an equitable mortgage, if the case

(*t*) *Re Rogers*, 13 L. J. Ch. 262, L. C.; *Re Jones*, 33 Ch. D. 414.

(*u*) *Re Watson*, 19 Ch. D. 384, C. A.; not following *Re Nash*, 16 Ch. D. 503, C. A.

(*v*) *Re Harwood*, 35 Ch. D. 470, C. A.

(*x*) See (1895) 1 Ch. 283, 284.

(*y*) 13 & 14 Vict. c. 60.

(*z*) 56 & 57 Vict. c. 53. See these sections set out *inf.*

(*a*) See *Re Arrowsmith's Trusts*, 4 Jur. N. S. 1123.

does not come within sect. 30 of the Conveyancing Act, 1881 (*b*), the infant heir of a mortgagor (his devisees in trust having disclaimed) is a trustee for the mortgagee (*c*). Where a decree for sale is made in a foreclosure suit against the infant heir of the mortgagor, and the legal estate is in the mortgagee, a vesting order is unnecessary, equitable interests being bound by the decree (*d*).

Where a person deposited the title deeds of freehold property with his bankers as security for a debt, and agreed to execute a legal mortgage when required by them, on the death of the mortgagor intestate an order was made declaring his infant heir a trustee, and vesting the legal estate in the mortgagees, subject to the right of redemption (*e*).

By the Trustee Act, 1893, it is enacted that—

Orders as to contingent rights of unborn persons.

Sect. 27. "Where any land is subject to a contingent right in an unborn person, or class of unborn persons, who, on coming into existence, would, in respect thereof, become entitled to or possessed of land on any trust, the High Court may make an order releasing the land from the contingent right, or may make an order vesting in any person the estate to or of which the unborn person, or class of unborn persons, would, on coming into existence, be entitled or possessed in the land."

With regard to infant mortgagees, the Trustee Act, 1890, enacts as follows:—

Vesting order in place of conveyance by infant mortgagee.

Sect. 28. "Where any person entitled to or possessed of land, or entitled to a contingent right in land, is an infant, the High Court may make an order vesting or releasing, or disposing of the land or right in like manner as in the case of an infant trustee."

Infant heir of mortgagee of copyholds.

Where a mortgagee of copyholds who had been admitted died intestate as to mortgage estates, an order was made vesting the legal estate which had devolved upon the customary heir, an infant, in the mortgagee's executors (*f*).

Vesting orders as to land.

iii.—Mortgagee or Trustee out of Jurisdiction not to be found or refusing to convey.—Sect. 26 of the Trustee Act, 1893 (*g*), empowers the Court to make vesting orders of land

(*b*) Set out *ante*, p. 866. And see *post*, p. 1448.

(*c*) *Foster* v. *Parker*, 8 Ch. D. 147.

(*d*) *Re Williams*, 5 De G. & S. 515.

(*e*) *Re Jones's Mortgage*, W. N. (1888) 217.

(*f*) *Re Franklyn*, W. N. (1888) 217.

(*g*) 56 & 57 Vict. c. 53.

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where trustees are infants or out of the jurisdiction or cannot be found, and sect. 35 makes similar provision with regard to stock and choses in action.

Mortgagee held trustee for mortgagor.

Where the trusts for sale under a mortgage were for payment out of the proceeds of sale of the mortgage moneys, and, subject thereto, for the mortgagor, his executors, administrators, and assigns, the mortgagee was held to be a trustee within the corresponding section (*h*) of the Trustee Act, 1850; and the same course was followed where the mortgage contained a power of sale with a similar disposition of the surplus (*i*).

When heir of mortgagee is trustee for mortgagor.

After a mortgagee is dead, and the mortgage money is paid to his personal representatives, if the case does not fall within the Conveyancing Act of 1881, the heir or devisee of the mortgagee is a trustee for the mortgagor (*k*).

Joint mortgagee.

A joint mortgagee out of the jurisdiction is not a trustee within sect. 26 of the present Act (*l*), unless the advance has been made out of trust funds, and a new trustee has been appointed in place of the trustee out of the jurisdiction (*m*). But the co-heirs of a mortgagee have been held to be so within the corresponding section of the Trustee Act, 1850; and accordingly, in a case before 1882, where one of such co-heirs was out of the jurisdiction, he was held to be a trustee for the person entitled to the mortgage moneys (*n*).

Trustee-mortgagee.

The section applies in all cases of redemption where a mortgagee is a trustee of mortgage moneys (*o*); and a person in whose name a mortgage is taken to secure moneys advanced by other persons is a trustee (*p*).

Vesting order subject to charge.

An order has been made under the corresponding sections of the former Trustee Acts to vest the legal estate in the devisees of a mortgagor, subject to a charge created by his will (*q*).

Mortgagor held trustee for mortgagee after foreclosure.

A defendant, against whom an absolute decree of foreclosure upon an equitable mortgage is made, but who cannot be found, is a trustee for the mortgagee within this section (*r*); and in such a case, on non-payment of principal, interest, and costs,

(*h*) *Re Underwood*, 3 K. & J. 745.
(*i*) *Re Keeler*, 32 L. J. Ch. 101.
(*k*) *Foster* v. *Parker*, 8 Ch. D. 147.
(*l*) See *Re Osborn's Mortgage*, L. R. 12 Eq. 392.
(*m*) *Re Walker's Mortgage*, 3 Ch. D. 209.
(*n*) *Re Templer's Trust*, 4 N. R. 494; *Re Hughes' Settlement*, 2 H. & M. 695.
(*o*) *Re O'Gorman*, 25 L. R. Ir. 93.
(*p*) *Re Barber*, 48 L. T. 303.
(*q*) *Re Ellerthorpe*, 18 Jur. 669.
(*r*) *Lechmere* v. *Clamp*, 30 Beav. 218; 31 Beav. 578.

an order will be made vesting the mortgaged property in the plaintiff (*s*).

Covenant to assign leasehold reversion.

A mortgagor who had covenanted to assign the last day of the term to a purchaser was held not to be a trustee within the Act (*t*); but if the mortgagor covenant in the meantime to hold the outstanding estate upon trust for the mortgagee, he becomes a trustee within it (*u*), and a vesting declaration may be made (*v*).

Refusal to convey.

Where a mortgagor, who had covenanted to surrender copyholds, neglected to make such surrender within twenty-eight days after demand and tender of engrossment by the mortgagee, a vesting order was made (*x*).

So where a mortgagee after being paid off refused to execute a reconveyance, the Court appointed one of the masters of the Court to reconvey (*y*).

Married woman.

After decree in a foreclosure suit for sale of an estate mortgaged by a woman before her marriage, and not settled to her separate use, it would seem that, in case of her refusal to convey, a petition might be presented, treating her as a trustee, though the Lord Chancellor discharged the peremptory order for obliging her to convey in execution of the decree for sale (*z*).

Heir of mortgagee trustee for his executors.

Where a mortgagee had taken possession and received the rents up to her death, it was held that her executors might, either under sect. 9 (*a*) or sect. 13 (*b*) of the Act of 1850 (both of which sections are replaced by sect. 26 of the present Act), obtain a vesting order of the real estate which had descended, under the old law as to devolution of mortgage estates, on the heir who was out of the jurisdiction.

Where the executor and executrix (a married woman) of a mortgagee applied for a vesting order, the Court, instead of vesting the property in the executor and executrix, in which case the *feme covert*, in order to part with it, would have had to acknowledge the deed, vested it in such person as the executor

(*s*) See note (*r*), opposite.

(*t*) *Re Propert's Purchase*, 22 L. J. Ch. 948, *sed quære; ante*, p. 165.

(*u*) *Re Collingwood*, 6 W. R. 536.

(*v*) See *London and County Banking Co.* v. *Goddard*, (1897) 1 Ch. 642.

(*x*) *Re Crowe's Mortgage*, L. R. 13 Eq. 26. See *Re Mill's Trusts*, 40 Ch. D. 14, C. A.

(*y*) *Holme* v. *Fieldsend*, W. N. (1911) 111, where the form of order is given.

(*z*) *Jordan* v. *Jones*, 2 Ph. 170. And see *King* v. *Leach*, 2 Ha. 57; *Rowley* v. *Adams*, 14 Beav. 130.

(*a*) *Re Skitter's Trusts*, 4 W. R. 791.

(*b*) *Re Keeler*, 32 L. J. Ch. 101.

and executrix should appoint, and in default thereof in the executor and executrix (*c*). Similarly a vesting order and declaration was made to uses to bar dower (*d*).

Convict.

No vesting order is required in the case of a convict mortgagee; for the property vested in him as mortgagee does not vest in his administrator under the Forfeiture Act, 1870 (*e*), but remains in the convict, who can reconvey the same accordingly (*f*).

iv.—Vesting Order on Death of Mortgagee.—The Trustee Act, 1893, enacts as follows:—

Vesting order in place of conveyance by heir, or devisee of heir, &c., or personal representative of mortgagee.

Sect. 29. "Where a mortgagee of land has died without having entered into the possession or into the receipt of the rents and profits thereof, and the money due in respect of the mortgage has been paid to a person entitled to receive the same, or that last-mentioned person consents to any order for the reconveyance of the land, then the High Court may make an order vesting the land in such person or persons in such manner and for such estate as the Court may direct in any of the following cases, namely:—

(a) Where an heir or personal representative or devisee of the mortgagee is out of the jurisdiction of the High Court or cannot be found; and

(b) Where an heir or personal representative or devisee of the mortgagee on demand made by or on behalf of a person entitled to require a conveyance of the land has stated in writing that he will not convey the same or does not convey the same for the space of twenty-eight days next after a proper deed for conveying the land has been tendered to him by or on behalf of the person so entitled; and

(c) Where it is uncertain which of several devisees of the mortgagee was the survivor; and

(d) Where it is uncertain as to the survivor of several devisees of the mortgagee or as to the heir or personal representative of the mortgagee whether he is living or dead; and

(e) Where there is no heir or personal representative to a mortgagee who has died intestate as to the land, or where the mortgagee has died and it is uncertain who is his heir or personal representative or devisee."

This section in effect re-enacts the repealed sect. 19 of the Trustee Act, 1850, but in terms which make the present enactment applicable to cases where the mortgage estate devolves

(*c*) *Re Powell*, 4 K. & J. 338.

(*d*) *Davey* v. *Miller*, 1 Sm. & G. App. 19; *Re Howard*, 21 L. J. Ch. 437.

(*e*) 33 & 34 Vict. c. 23.

(*f*) Trustee Act, 1893 (56 & 57 Vict. c. 53), s. 48, re-enacting 13 & 14 Vict. c. 60, ss. 46, 47. See *Re Levi and Debenture Corp.*, 42 W. R. 533.

upon the personal representatives of a deceased mortgagee by virtue of sect. 30 of the Conveyancing Act, 1881. Sect. 30 of the Conveyancing Act does not apply to copyholds (*g*), and the reference to the heir or devisee in the above sub-sections would seem to have reference only to copyhold property (*h*).

Meaning of word "reconveyance."

The word "reconveyance" does not apply only to the case of a mortgagor when the mortgage is paid off; the personal representatives of a mortgagee who had not taken possession can obtain a vesting order where the heir of the mortgagee cannot be found, though the debt is not paid off (*i*). It appears, however, that such an order will not be made unless it is intended to sell or transfer the mortgage (*k*).

Mortgagee intestate and illegitimate.

If the mortgagee died intestate and was illegitimate, the vesting order will be made after service on the Crown (*l*).

Cases not within s. 29.

The following cases are not, nor were intended to be, provided for by sect. 29, namely, where the mortgagee is still living, or where he has died seised, but had been in actual possession or in the receipt of the rents and profits.

A vesting order may be made under this section in the Chancery Division, though the will of the mortgagee is disputed and an action to establish it is pending in the Probate Division (*m*).

v.—Effect of Vesting Orders.—As regards the effect of vesting orders made under the Trustee Act, 1893 (other than vesting orders on appointment of new trustees), it is enacted that:—

Effect of vesting order.

Sect. 32. "A vesting order under any of the foregoing provisions shall . . . . have the same effect as if the trustee or other person or description or class of persons to whose rights or supposed rights the said provisions respectively relate had been an ascertained and existing person of full capacity, and had executed a conveyance or release to the effect intended by the order."

Power to appoint person to convey.

Sect. 33. "In all cases where a vesting order can be made under any of the foregoing provisions, the High Court may, if it is more convenient, appoint a person to convey the land or release the contingent right, and a conveyance or release by that person in

(*g*) 50 & 51 Vict. c. 78, s. 45.

(*h*) *Re Mill's Trusts*, 37 Ch. D. 312.

(*i*) *Re Boden's Mortgage*, 1 De G. M. & G. 57; *Re Quinlan's Trusts*, 9 Ir. Ch. R. 306; *Re Lea's Trusts*, 6 W. R. 482; overruling *Meyrick's Trusts*, 9 Ha. 116.

(*k*) *Re Hewitt*, 27 L. J. Ch. 302, C. A. And see *Re Dearden*, 3 My. & K. 508.

(*l*) *Re Minchin's Estate*, 2 W. R. 179.

(*m*) *Re Cook's Mortgage*, (1895) 1 Ch. 700.

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conformity with the order shall have the same effect as an order under the appropriate provision" (*n*).

Effect of vesting order as to copyhold.

Sect. 34.—"(1.) Where an order vesting copyhold land in any person is made under this Act with the consent of the lord or lady of the manor, the land shall vest accordingly without surrender or admittance.

"(2.) Where an order is made under this Act appointing any person to convey any copyhold land, that person shall execute and do all assurances and things for completing the assurance of the land; and the lord and lady of the manor and every other person shall, subject to the customs of the manor and the usual payments, be bound to make admittance to the land and to do all other acts for completing the assurance thereof, as if the persons in whose place an appointment is made were free from disability and had executed and done those assurances and things."

An order vesting the estate of an infant tenant in tail in possession has the effect of barring the estate tail and remainders over (*o*).

The lord need not appear to consent to the order; a verified certificate of his consent is sufficient (*p*).

Jurisdiction in lunacy.

vi.—Jurisdiction and Procedure with regard to Vesting Orders.—The jurisdiction to make vesting orders in the case of lunatic mortgagees or mortgagors is now vested, under the Lunacy Act, 1890 (*q*), in the Lord Chancellor, and in the judges entrusted by his Majesty's sign manual with the care of lunatics.

But by the Lunacy Act, 1911 (*r*), the powers of a judge in lunacy to make vesting orders, except so far as they relate to lunatic mortgagees not being also trustees, are transferred to the High Court.

A Master in Lunacy has no jurisdiction to make a vesting order alone under sect. 136 of the Lunacy Act, 1890 (*s*).

Jurisdiction of High Court under Trustee Act, 1893.

The jurisdiction under the Trustee Act, 1893, is vested in the "High Court," which expression, by the Interpretation Act, 1889 (*t*), shall mean his Majesty's High Court of Justice in England or Ireland, as the case may be. The jurisdiction of the High Court in all proceedings under this Act is assigned to the Chancery Division (*u*).

(*n*) *Ante*, p. 1447.
(*o*) *Re Montagu, Faber* v. *Montagu*, (1896) 1 Ch. 549.
(*p*) *Ayles* v. *Cox*, 17 Beav. 584.
(*q*) 53 Vict. c. 5. And see Lunacy Act, 1891.
(*r*) 1 & 2 Geo. V. c. 40, s. 1.
(*s*) *Re Langdale*, (1901) 1 Ch. 3.
(*t*) 52 & 53 Vict. c. 63.
(*u*) R. S. C. (Trustee Act) 1893, Ord. LIVB. r. 1.

As regards property situate abroad, it is enacted that:—

Vesting orders of land out of England.

Sect. 41. "The powers of the High Court in England to make vesting orders under this Act shall extend to all land and personal estate in her Majesty's dominions, except Scotland."

By the Trustee Act, 1894, s. 2, these powers are extended to the High Court in Ireland.

Procedure.

The procedure to be followed in applications for vesting orders under the Trustee Act, 1893, is dealt with by the Act as follows:—

Persons entitled to apply for orders.

Sect. 36.—"(2.) An order under this Act concerning any land, stock, or chose in action subject to a mortgage may be made on the application of any person beneficially interested in the equity of redemption, whether under disability or not, or of any person interested in the money secured by the mortgage."

The expression "person beneficially interested" includes a purchaser on a sale of property under an order of the Court (*x*), and a creditor who brings an action for the administration of the real and personal estate of a testator or intestate (*y*).

Applications for vesting orders under the Lunacy Act, 1890, are made by summons unless the Judge in Lunacy or a Master directs a petition to be presented (*z*).

Mode of application.

The proper mode of applying for a vesting order in the Chancery Division is by petition (*a*); but the application may be by summons in any case where a judgment or order has been given or made for the sale, conveyance, or transfer of any land or stock; or where the application relates to a fund paid into Court where the moneys or securities in Court do not exceed 1,000*l.* in amount or nominal value (*b*). In such excepted cases the application will be by ordinary summons if made in a pending matter, otherwise by originating summons.

The petition or summons must state the section or sections of the Act under which it is proposed that the order shall be made (*c*).

Service of petition.

Where a vesting order is asked for in place of a conveyance

(*x*) *Rowley* v. *Adams*, 14 Beav. 130.

(*y*) *Re Wragg*, 1 De G. J. & S. 356.

(*z*) W. N. (1900) Misc. 229. But see *Re Langdale, sup.*

(*a*) R. S. C. Ord. LIVB. r. 2.

(*b*) Ord. LV. r. 13A.

(*c*) Ord. LIVB. r. 4A.

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by an infant mortgagee (*d*), the petition should be served upon him, as it is contrary to sound principle that an estate should be taken away from a person without giving him notice (*e*).

In a case under sect. 2 of the Trustee Extension Act, 1852 (*f*), a vesting order of copyholds which the mortgagor had covenanted, but had refused for twenty-eight days after demand, to surrender, was made without serving the mortgagor with the petition (*g*).

A petition for a vesting order under sect. 35 (ii) (d) should not be presented or served before the expiration of the twenty-eight days (*h*).

Where the customary fee of copyholds was surrendered by a debtor to his creditor upon trust to sell, and pay the surplus to the debtor, his executors, administrators, and assigns, and the creditor sold the property for less than the debt after the death of the debtor and his customary heir, the copyholds were vested by the Court in the purchaser without notice being served on either heir or personal representative (*i*).

Where, on a sale by a beneficial owner of land, it appeared that the legal estate was vested in a person, who had gone to Australia more than twenty years previously, as heir-at-law of a deceased trustee, it was held that a vesting order might be made without serving the petition on him (*k*).

The Trustee Act, 1893, further enacts as follows:—

Orders made upon certain allegations to be conclusive evidence.

Sect. 40. "Where a vesting order is made as to any land under this Act or under the Lunacy Act, 1890, or under any Act relating to lunacy in Ireland, founded on an allegation of the personal incapacity of a trustee or mortgagee, or on an allegation that a trustee or the heir or personal representative or devisee of a mortgagee is out of the jurisdiction of the High Court or cannot be found, or that it is uncertain which of several trustees or which of several devisees of a mortgagee was the survivor, or whether the last trustee or the heir or personal representative or last surviving devisee of a mortgagee is living or dead, or on an allegation that any trustee or mortgagee has died intestate without an heir or has died and it is not known who is his heir or personal representative or devisee, the fact that the order has been so made shall be conclusive evidence of the matter so alleged in any Court upon any

(*d*) *Sup.* p. 1444.

(*e*) *Re Jones's Mortgage,* 22 W. R. 537. See *Re Adam,* W. N. (1887) p. 175, where service on the guardian *ad litem* was directed.

(*f*) 15 & 16 Vict. c. 55.

(*g*) *Re Crowe's Mortgage,* L. R. 13 Eq. 26.

(*h*) *Re Knox,* (1895) 2 Ch. 483.

(*i*) *Re Wise,* 5 De G. & S. 415. See *Re Jones' Mortgage,* 22 W. R. 857; *Re Little,* L. R. 7 Eq. 323.

(*k*) *Re Stanley's Trusts,* W. N. (1893) 30.

question as to the validity of the order; but this section shall not prevent the High Court from directing a reconveyance or the payment of costs occasioned by any such order if improperly obtained."

This section in effect re-enacts sect. 44 of the Trustee Act, 1850, and sect. 140 of the Lunacy Act, 1890 (both repealed), and prevents a vesting order from being inoperative merely because made on allegations which prove to be untrue.

Rule as to costs where a mortgagee absconds or is a lunatic.

vii.—Costs.—The costs of reconveyance fall on the mortgagor (*l*) even when a vesting order is necessary by reason of the disappearance of one of the mortgagees (*m*). If a lunatic mortgagee is a trustee of the mortgage money and the mortgagor had notice of the fact, the costs of a vesting order in lieu of reconveyance will fall on the mortgagor (*n*). But generally, where a vesting order is required by reason of the mortgagee having become a lunatic (*o*), or where the legal estate has devolved upon a lunatic (*p*), the costs of the committee requisite to enable him to convey, including the order of reference under the statute, must be paid out of the estate of the lunatic; but not the costs of the mortgagor. The contrary course which at one time prevailed has been disapproved of, and in future, where the committee presents a petition for reconveyance or for a vesting order, the mortgagor must not be served, and if served would not have his costs (*q*).

The costs of the application of the mortgagor to obtain a vesting order when the mortgagee is of unsound mind, not so found, could not, under the Act of 1850, be paid out of the mortgage debt; the Court has no jurisdiction (*r*).

One of the trustees of a mortgagee having become lunatic, the costs of the reconveyance on payment off of the mortgage were directed to be paid out of the trust funds (*s*).

By the Trustee Act, 1893, the costs and expenses of and

(*l*) See *inf.*, notes (*u*) and (*x*).

(*m*) *Webb* v. *Crosse*, (1912) 1 Ch. 323.

(*n*) *Re Lewis*, 1 Mac. & G. 23. See *Re Fulham*, 15 Jur. 69.

(*o*) *Exp. Richards, Re Lewis*, 1 J. & W. 264; *Re Townsend*, 2 Ph. 348; *Re Wheeler*, 1 De G. M. & G. 434; *Re Biddle*, 23 L. J. Ch. 23, L.JJ.; *Re Viall*, 8 De G. M. & G. 439; *Thomas's Case*, 22 L. J. Ch. 858.

(*p*) *Re Stuart*, 4 De G. & J. 319.

(*q*) *Re Marrow*, Cr. & Ph. 146; *Re Rowley*, 1 De G. J. & S. 417; *Re Phillips*, L. R. 4 Ch. 629.

(*r*) *Re Sparkes*, 6 Ch. D. 361, C. A.; notwithstanding *Re Biddle, sup.*

(*s*) *Re Jones*, 2 Ch. D. 70, C. A.

incident to applications under that Act are in the discretion of the Court.

Power to charge costs on trust estate.

Sect. 38. "The High Court may order the costs and expenses of and incident to any application for an order appointing a new trustee, or for a vesting order, or of and incident to any such order, or any conveyance or transfer in pursuance thereof, to be paid or raised out of the land or personal estate in respect whereof the same is made, or out of the income thereof, or to be borne and paid in such manner and by such persons as to the Court may seem just."

The words "by such persons" are new.

Rules as to costs.

Under sect. 51 of the repealed Act of 1850, the infant heir of the mortgagor was not entitled to his costs (*t*).

The costs of the proceedings under the Act to obtain a reconveyance from the infant representative of the mortgagee, or a vesting order, must be paid by the mortgagor (*u*).

As a general rule, as between mortgagee or mortgagor, the mortgagor must pay the costs of a reconveyance, or of an order in lieu thereof, vesting the property in the mortgagor (*x*).

But where a mortgagee, who is a trustee of the legal estate within the meaning of the Act, refuses to convey after due request in writing, he may be required to pay the costs of a petition praying for a vesting order (*y*).

(*t*) *Wade* v. *Ward*, 4 Drew. 602.

(*u*) *Exp. Ommaney*, 10 Sim. 298; *King* v. *Smith*, 6 Ha. 473; cf. *Capper* v. *Terrington*, 1 Coll. 103.

(*x*) See *Exp. Richards*, *Re Lewis*, 1 J. & W. 264; *Re Wheeler*, 1 De G. M. & G. 434; *King* v. *Smith*, *sup.*

(*y*) *Re Knox's Trusts*, (1895) 2 Ch. 483, C. A. See *Rourke* v. *Robinson*, (1911) 1 Ch. 480.

CHAPTER LXII.

DISCHARGE OF THE SECURITY BY MERGER.

SECTION I.

MERGER OF SECURITY BY UNION OF THE MORTGAGE ESTATE WITH THE EQUITY OF REDEMPTION.

Rules of equity to prevail as to merger.

1.—General Rule as to Merger.—The law of merger of charges, unlike the legal doctrine of merger of estates, is founded not upon feudal principles, but upon certain clear and well-defined doctrines of equity engrafted upon a principle borrowed from the civil law (*a*).

By the Judicature Act, 1873, s. 25 (4), it is enacted that there shall not, after the commencement of the Act, be any merger, by operation of law only, of any estate the beneficial interest in which would not be deemed to be merged or extinguished in equity.

Former conflict between law and equity.

Before that enactment cases frequently occurred in which there was a merger at law, but not in equity; and, conversely, in which a security, which remained subsisting at law, was held to be merged in equity (*b*).

The principle.

The principle established by a long series of authorities is that when an incumbrance is paid off by a person having a partial interest, the presumption is that he intends to keep it alive for his own interest, but where the party paying off the incumbrance is entitled to the fee simple the presumption is different (*c*).

Merger depends on intention.

When the owner of an estate pays charges on the estate which he is not personally liable to pay the question whether those charges are to be considered as extinguished or kept alive

(*a*) *Re Godley's Estate*, (1896) 1 Ir. R. at p. 50.

(*b*) See *Forbes* v. *Moffatt*, 18 Ves. 384; *Bulkeley* v. *Hope*, 1 K. & J. 482.

(*c*) *Re Tasker & Sons*, (1905) 2 Ch. 587.

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is simply a question of intention (*d*). If no intention is declared, then it depends upon presumption of intention arising from the nature of the charge, and the circumstances of the case (*e*); and in the absence of any evidence of intention, the Court looks to the benefit of the person in whom the charge has become vested (*f*). This rule applies to the merger of estates as well as to the merger of charges (*g*). It has been doubted in a recent case whether the rule applies where a merger of legal estates has actually taken place, and whether intention is sufficient to prevent the merger of legal interests (*h*); but the rule now seems to be that there is no merger at law where there would have been none in equity (*i*).

Mortgage paid off by owner of estate of inheritance.

ii.—Payment off of Mortgage by Owner of Equity of Redemption.—In the absence of any evidence of intention, by express declaration or otherwise, if a tenant in fee simple or in tail of an estate pays off a mortgage, to which the estate is subject, the payment is *primâ facie* presumed to be for the benefit of the inheritance, and the charge is merged in the estate and extinguished (*k*); but the Court will presume an intention to keep the charge alive if it is obviously for his benefit (*l*), and if the intention is not a dishonest one which would constitute a fraud (*m*).

Tenant in tail in possession.

Where a tenant in tail in possession pays off a charge, the merger takes place on the ground that he can, at his own pleasure, acquire the absolute fee (*n*); and, accordingly, though he omits to do so, it is to be supposed that he intended that the inheritance should be exonerated for the benefit of the remainderman in tail (*o*).

(*d*) *Thorne* v. *Cann*, (1895) A. C. 11, per Lord Macnaghten.

(*e*) *Hood* v. *Phillips*, 3 Beav. 513, 517.

(*f*) *Liquidation Estates Co.* v. *Willoughby*, (1898) A. C. 321; *Ingle* v. *Vaughan-Jenkins*, (1900) 2 Ch. 368. But see *Manks* v. *Whiteley*, (1912) 1 Ch. 735.

(*g*) *Capital and Counties Bank* v. *Rhodes*, (1903) 1 Ch. 631, C. A.

(*h*) *Thellusson* v. *Liddard*, (1900) 2 Ch. 635, 645.

(*i*) *Capital and Counties Bank* v. *Rhodes*, *sup.*, per Cozens-Hardy, L.J.

(*k*) *Farrow* v. *Rees*, 4 Beav. 18; *Aldridge* v. *Westbrook*, 5 Beav. 188; *Bailey* v. *Richardson*, 9 Ha. 734; *Medley* v. *Horton*, 14 Sim. 222, 226; *Swabey* v. *Swabey*, 15 Sim. 106; *Hatch* v. *Skelton*, 20 Beav. 453; *Pears* v. *Weightman*, 2 Jur. N. S. 586.

(*l*) *Thorne* v. *Cann*, (1895) A. C. 11.

(*m*) *Re Gibbon*, (1909) 1 Ch. 367.

(*n*) *Jones* v. *Morgan*, 1 Bro. C. C. 206, 217; *Kirkham* v. *Smith*, 1 Ves. Sen. 257; *Ware* v. *Polhill*, 11 Ves. 277; *St. Paul* v. *Dudley*, 15 Ves. 173; *Smith* v. *Frederick*, 1 Russ. 208; *Horton* v. *Smith*, 4 K. & J. 624, 627.

(*o*) See *Drinkwater* v. *Coombe*, 2 S. & St. 340, 345, *post*, p. 1459.

On this principle, it has been held that the merger does not take place where the tenant in tail, paying off the charge, is entitled only in remainder (*p*). If, however, he becomes entitled under a will, or otherwise, without payment or act on his part, to a charge on the estate, then, upon the devolution of the estate upon him, a merger takes place, unless there is an intention shown to the contrary (*q*).

Tenant in tail in remainder.

If a tenant in tail entitled to a charge on the estate is an infant, the charge is not merged if he dies under twenty-one, as well upon other grounds as upon the principle that, until that age, he cannot acquire the absolute property in the land (*r*).

Infant tenant in tail.

This principle seems to apply to the case of a lunatic tenant in tail, though it is otherwise in the case of a lunatic tenant in fee (*s*).

Lunatic tenant in tail.

The presumption as to merger does not arise where a charge upon settled land and a life estate in the land subject to the mortgage become united in the same person. If a tenant for life pays off such a charge, he is *primâ facie* entitled to that charge for his own benefit, because of the scantiness of his estate, and he will not be supposed to discharge a debt on another man's estate (*t*); but in either case the presumption may be rebutted by evidence to the contrary (*u*). And there is no difference in this respect between a charge merely equitable and one that is supported by an outstanding legal estate, nor will an assignment in trust for the party paying it off of itself prevent a merger (*x*), though it serves as some evidence of an intent to do so (*y*).

Mortgage paid off by tenant for life.

There is no obligation on the tenant for life to declare his intention to keep the charge alive, and the onus lies on those who claim to have the estate exonerated (*z*). And even where

Burden of proof.

(*p*) *Wigsell* v. *Wigsell*, 2 S. & St. 364; *Horton* v. *Smith*, *sup.*

(*q*) *Horton* v. *Smith*, 4 K. & J. 624.

(*r*) *Thomas* v. *Kemeys*, 2 Vern. 348; *Smith* v. *Frederick*, 1 Russ. 174, 208; *Duke of Chandos* v. *Talbot*, 2 P. Wms. 604; *Seys* v. *Price*, 1 Barn. Ch. R. 117; *Wigsell* v. *Wigsell*, 2 S. & St. 364.

(*s*) *Lord Compton* v. *Oxenden*, 2 Ves. Jun. 261.

(*t*) *Jones* v. *Morgan*, 1 Bro. C. C. 217; *Faulkner* v. *Daniel*, 3 Ha. 199; *Jameson* v. *Stein*, 21 Beav. 5; *Cole* v. *Stutely*, 6 Jur. 314. See *Moore* v. *Moore*, 60 L. T. 626.

(*u*) Per Lord Eldon in *Earl of Buckinghamshire* v. *Hobart*, 3 Swanst. 186, 199. And see *Kensington* v. *Bouverie*, 7 De G. M. & G. 134; *Pitt* v. *Pitt*, 22 Beav. 294.

(*x*) *Astley* v. *Milles*, 1 Sim. 341, 344. But see *Swabey* v. *Swabey*, 15 Sim. 106.

(*y*) *Hood* v. *Phillips*, 3 Beav. 513.

(*z*) *Burrell* v. *Egremont*, 7 Beav. 205.

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he takes a reconveyance to himself freed from the mortgage debt, he is entitled, on proving that he intended to keep the charge alive for his benefit, to have a declaration by the Court to that effect (*a*).

Change of circumstances after intention to merge.

Where a mortgage in fee of settled lands was bequeathed to the tenant for life, who, being in affluent circumstances, clearly indicated an intention to merge the mortgage in the inheritance, but died insolvent, it was held that, there being no evidence of contrary intention, during the latter part of his life, the mortgage must be deemed to have merged at the earliest date on which, according to the evidence, the intention to merge was indicated (*b*).

Where a tenant for life pays off a mortgage on the estate, the mere fact that the remainderman is his son is not sufficient to rebut the presumption that he intends to keep alive the charge for the benefit of his personal estate (*c*).

Statute of Limitations.

Time does not run against a tenant for life in possession who pays off a charge, but does not show any intention of keeping it alive, under the 3 & 4 Will. IV. c. 27, s. 40 (*d*).

Bond paid off.

If a devisee tenant for life pays off a bond debt, there is no presumption that the debt was kept alive for his benefit (*e*).

Rights against puisne mortgagee.

Where the tenant for life mortgages subject to a prior charge on the inheritance which he afterwards pays off and procures to be assigned to a trustee for himself, he and his assigns have a right to hold the charge so paid off in priority to the puisne mortgage (*f*).

Tenant for life with ultimate remainder in fee.

Where a charge is paid off by a tenant for life, who is also entitled to an ultimate remainder in fee on the failure of intermediate limitations, as if there be contingent remainders to his issue between his life estate and reversion, the charge, it seems, is kept alive for the benefit of his personal estate (*g*).

Judgment creditor of tenant for life.

If a tenant for life paying off an incumbrance has a charge against the inheritance, a judgment creditor of the tenant for life has a right to stand in his place to that extent against the

(*a*) *Gifford* v. *Fitzhardinge*, (1899) 2 Ch. 32.
(*b*) *Re Godley's Estate*, (1896) 1 Ir. 45.
(*c*) *Re Harvey*, *Harvey* v. *Hobday*, (1896) 1 Ch. 137, C. A.
(*d*) *Burrell* v. *Egremont*, 7 Beav. 205; *Kensington* v. *Bouverie*, 7 D. M. & G. 134.
(*e*) *Morley* v. *Morley*, 5 De G. M. & G. 610.
(*f*) *Harman* v. *Forster*, 1 Dr. & Wal. 637.
(*g*) *Wyndham* v. *Egremont*, Amb. 753; *Trevor* v. *Trevor*, 2 My. & K. 675.

inheritance (*h*). If a tenant for life of two estates, subject to distinct mortgages, suffers the interest of one to fall in arrear, and the mortgagee of the other enters into possession and by surplus rents pays off part of the principal, the tenant for life cannot claim a charge on the inheritance for such surplus without payment of the interest in arrear of the other; and a judgment creditor of the tenant for life is subject to the same liabilities as the tenant for life, if at the time of the registration of his judgment no surplus rents had been received (*i*).

Payment by owner of defeasible fee.

Again, no presumption of merger will arise where a charge is paid off by a person possessed of an estate of inheritance in the mortgaged property defeasible under an executory devise (*k*).

Devolution of mortgage kept alive.

Where the owner of an equity of redemption takes a transfer and declares that the mortgage is to be kept on foot for the benefit of himself, his heirs and assigns, the mortgage will pass on his death intestate as personal estate to his next of kin. The result is the same on a conveyance by mortgagor and mortgagee, and the charge is declared to be kept alive as a protection to the owner of the equity of redemption, his heirs and assigns, against subsequent incumbrancers, "and for no other purpose" (*l*).

Presumption of merger.

iii.—Acquisition of Equity of Redemption by Mortgagee.—If a mortgagee becomes entitled, by purchase or otherwise, to the equity of redemption in the property, subject to the mortgage, for an estate of inheritance, and if it is indifferent to his interests whether the charge should or should not be treated as continuing, a presumption will arise at his death that the charge was merged in the inheritance and extinguished (*m*).

There is, however, no merger unless the right to the money and the right to the estate are absolute and co-extensive (*n*).

Mortgagee heir-at-law of mortgagor.

So where a wife and her husband mortgaged the inheritance to secure a debt owing by her before marriage, and the mortgagee, on the death of the wife, succeeded to the estate as her

(*h*) *Dolphin* v. *Aylward*, L. R. 4 H. L. 486.

(*i*) *Scholefield* v. *Lockwood*, 4 De G. J. & S. 22.

(*k*) *Drinkwater* v. *Coombe*, 2 S. & St. 340, 345. See *Horton* v. *Smith*, 4 K. & J. 624.

(*l*) *Re Gibbon*, (1909) 1 Ch. 367.

(*m*) *Allen* v. *Aldridge*, 6 Jur. 183; *Swinfen* v. *Swinfen*, 29 Beav. 199. See *Re Simmons*, 87 L. T. 594.

(*n*) *Re Simmons*, *sup.*; *Re Drax*, (1903) 1 Ch. 781, C. A.

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heir-at-law, it was held that the mortgage merged, and that the debt was discharged (*o*).

Assignment to trustee for mortgagee.

A mortgagee purchasing an equity of redemption may preserve his mortgage unmerged by taking either an assignment to a trustee of the debt and the mortgage security, as well as a conveyance of the property subject to the mortgage (*p*); or a conveyance of the property containing an express declaration of the mortgagee's intention that the charge shall be kept on foot (*q*). But the mere conveyance of the property to a trustee, without any such assignment or declaration, is only regarded as affording some ground for rebutting the presumption of merger, and does not of itself amount to decisive evidence of intention that the mortgage shall not merge (*r*).

Conveyance in consideration of covenant to pay other debts.

So, also, the fact that a mortgagee takes a conveyance of the equity of redemption in consideration of debts due to himself and other mortgagees, whom he covenants to pay, will not be sufficient to rebut the presumption of merger (*s*).

iv.—**What will exclude Merger generally.**—The purchaser of a mortgaged estate discharged from the mortgage is entitled to require the property to be conveyed so as to prevent merger of the charge (*t*).

Intention to preserve charge must be indicated.

The question is one of intention, and very slight expressions will be sufficient to keep alive the security for the benefit of the personal estate. So, where a person paid off an existing first mortgage, and took a fresh mortgage of the property, an intention to preserve the charge was inferred from a conveyance by the new mortgage deed in as full and beneficial a manner as the first mortgagee could have held the property (*u*).

The question, however, is not whether the purchaser has shown an intention to keep the security alive for his own protection, but whether the Court can gather that he has shown an intention to merge it for all purposes (*x*).

Presumption of merger rebutted by

The general presumption that the union in the same person of a charge and of an estate of inheritance in the property

(*o*) *Gee* v. *Smart*, 8 E. & B. 313.
(*p*) *Thorne* v. *Cann*, (1895) A. C. 11, 16.
(*q*) *Bailey* v. *Richardson*, 9 Ha. 734.
(*r*) *Parry* v. *Wright*, 5 Russ. 142; *Hood* v. *Phillips*, 3 Beav. 513.
(*s*) *Brown* v. *Stead*, 5 Sim. 535.
(*t*) *Cooper* v. *Cartwright*, 1 John. 697.
(*u*) *Phillips* v. *Gutteridge*, 4 De G. & J. 531. And see *Irby* v. *Irby*, 25 Beav. 632.
(*x*) *Crosbie-Hill* v. *Sayer*, (1908) 1 Ch. 866, per Parker, J.; but see *Manks* v. *Whiteley*, *inf.*

charged will cause the charge to be merged and extinguished, is liable to be rebutted by any direct expression by the owner of the property of his intention that the charge shall be kept on foot (*y*), or by any act of his, by way of declaration of trust, assignment, or otherwise, clearly indicating such intention (*z*).

express or implied intention.

But no express or implied indication of intention will be of any effect until the time when the charge would, but for the contrary intention, have become united with the estate in the same person (*a*). Nor will a charge be kept alive simply because the purchaser afterwards finds it would have been better for him to have kept the charge alive (*b*). A person who pays off an incumbrance cannot treat it as still alive for the purpose of ousting subsequent incumbrances merely because it turns out to be for his advantage to do so; some distinct indication of intention to keep it alive must be shown at the time of paying it off (*c*).

Declaration against merger by mortgagor.

So, also, if a person seised of the inheritance in fee of property pays off a mortgage thereon, he may declare that the charge shall continue for the benefit of his personal estate (*d*). But in one case, notwithstanding a declaration of trust was executed of the charge for the owner in fee, it was held, under the circumstances, to be merged (*e*). Where a person so entitled sells the estate free from incumbrances, he is estopped from saying that there was no merger (*f*). The merger takes place whether the union is of a legal or equitable charge with the inheritance (*g*).

When two persons are entitled to a charge in moieties, and are also tenants in common of the land on which it is an incumbrance, either may elect either to keep his moiety of the charge on foot for the benefit of his personal estate, or to take

(*y*) *Bailey* v. *Richardson*, 9 Ha. 734.

(*z*) *Jones* v. *Morgan*, 1 Bro. C. C. 206; *Compton* v. *Oxenden*, 4 Bro. C. C. 397; *Tyler* v. *Lake*, 4 Sim. 53. See also *Medley* v. *Horton*, 14 Sim. 226; *Swabey* v. *Swabey*, 15 Sim. 106; *Farrow* v. *Rees*, 4 Beav. 18; *Hatch* v. *Skelton*, 20 Beav. 453; *Pears* v. *Weightman*, 2 Jur. N. S. 586; *Gunter* v. *Gunter*, 23 Beav. 571.

(*a*) *Tyrwhitt* v. *Tyrwhitt*, 32 Beav. 244; *Wilkes* v. *Collin*, L. R. 8 Eq. 338.

(*b*) (1896) 1 Ch. at p. 734, per Lindley, L.J.

(*c*) *Manks* v. *Whiteley*, (1912) 1 Ch. 735.

(*d*) *Jameson* v. *Stein*, 21 Beav. 5.

(*e*) *Pitt* v. *Pitt*, 22 Beav. 294.

(*f*) *Bulkeley* v. *Hope*, 1 K. & J. 482.

(*g*) *Astley* v. *Milles*, 1 Sim. 298; *Gower* v. *Gower*, 1 Cox, 53. See *Wyndham* v. *Lord Egremont*, Amb. 755.

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his share of the land unburthened with the charge, so as to compel the other, if he wishes to have a moiety of the charge, to raise it out of his own moiety of the land (*h*).

Declaration but no conveyance.

Where a purchaser had paid off a mortgage but took no transfer of the charge to a trustee, nor any conveyance of the property, but a written declaration was made by the vendor-mortgagor that, until the sale should be completed, the purchaser should stand in the place of the mortgagee and have the benefit of the security, it was held (notwithstanding that the memorandum of declaration recited that the payment had been made to the mortgagee out of the purchase-money and in discharge of the debt) that the security remained on foot for the benefit of the purchaser, and that the mortgagor's debt was not extinguished (*i*).

Declaration must be explicit.

If a declaration of trust is made, it should clearly state the intention that the charge shall be kept on foot and not merge in the inheritance.

Transfer of security to mortgagor.

If the owner of the equity of redemption, on paying off the mortgage, takes a transfer of the security to himself instead of a simple reconveyance, an intention to keep the charge alive will be presumed in the absence of evidence to the contrary (*k*).

Evidence from dealings with property.

Where an owner in fee subject to a mortgage devised and bequeathed his real and personal estate to the mortgagee, who, in his residuary account, stated that he had retained a sum out of the estate towards payment of his mortgage debt, and devised the mortgage property to certain persons "with all the liabilities attaching thereto," it was held that the charge must have been intended to be kept on foot, and, accordingly, had not merged in the fee (*l*).

Payment of head rent.

So, where an incumbrancer pays off arrears of head rent due on the estate and afterwards purchases the inheritance, in the absence of indication of contrary intention the debt will be deemed to be merged (*m*).

An equitable mortgagee who purchased the inheritance was bound to perform an agreement for a lease made with the

(*h*) *Smith* v. *Frederick*, 1 Russ. 174, at pp. 200, 211. But see the opinion of Mr. Fearne, on cases stated in Sand. Uses (4th ed.), p. 309.

(*i*) *Watts* v. *Symes*, 1 De G. M. & G. 240.

(*k*) *Thorne* v. *Cann*, (1895) A. C. 11.

(*l*) *Hatch* v. *Skelton*, 20 Beav. 453.

(*m*) *Garnett* v. *Armstrong*, 4 Dr. & War. 182.

mortgagor with notice of the mortgage, on the ground of merger (*n*).

Refusal of mortgagee to assign.

The refusal of the first mortgagee, after being paid off, to execute an assignment of the mortgaged premises, as he had agreed to do, to the party paying off such charge, will, of course, not prejudice such party (*o*).

Extraneous evidence admissible.

Correspondence at the time (*p*), or other parol evidence of conduct and dealings relating to the property (*q*), are admissible to explain the intention; and the evidence may be either direct or presumptive (*r*).

Transfer of mortgage to trustee for mortgagor.

Merger of a mortgage was held not to be prevented by a transfer of the mortgage to a trustee for the owner of the equity of redemption who paid off the mortgage, containing a covenant by the trustee to convey to the owner, her heirs or assigns, or on to such other person or persons and in such manner and form as the owner, her heirs, executors, and administrators, or assigns should direct (*s*).

Where a person entitled to a reversion in an estate bought up the charges thereon and had them transferred to trustees for him, who declared that they held the charges and the securities for the same, subject to certain contingent rights and interests, but so that, as against the persons contingently entitled to such rights and interests, the charges should remain on foot, and the reversioner afterwards became absolutely entitled in possession to the estate, it was held that under the circumstances the charges had merged in the inheritance (*t*).

Merger by release, &c.

A merger was shown by a release by the tenant for life (*u*); by a disposition of the estate without mention of the charge by will (*x*); or by mortgage (*y*); or settlement (*z*); but not by separate receipts of land tax from the tenant as a subsisting charge after it had been redeemed (*a*); it was held to be shown

(*n*) *Smith* v. *Phillips*, 1 Keen, 694. It would appear that the conveyance under which the defendant claimed showed that he bought the estate subject to the agreement for the lease.

(*o*) *Banks* v. *Whittal*, 17 L. J. Ch. 352. See *Butler* v. *Rice*, (1910) 2 Ch. 277.

(*p*) *Adams* v. *Angell*, 5 Ch. D. 634, C. A.

(*q*) *Astley* v. *Milles*, 1 Sim. 298, 341.

(*r*) *Hood* v. *Phillips*, 3 Beav. 513.

(*s*) *Ibid.*; but see *Thorne* v. *Cann*, *sup.*

(*t*) *Selsey* v. *Lake*, 1 Beav. 146.

(*u*) *Clifford* v. *Clifford*, 9 Ha. 675.

(*x*) *Swinfen* v. *Swinfen*, 29 Beav. 199.

(*y*) *Pitt* v. *Pitt*, 22 Beav. 294.

(*z*) *Johnson* v. *Webster*, 4 De G. M. & G. 474.

(*a*) *Blundell* v. *Stanley*, 3 De G. & S. 433. See *Neame* v. *Moorsome*, L. R. 3 Eq. 91.

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by a settlement of the estate which was subject to the charge, providing that it should not be raised, though the puisne incumbrancer benefited was not a party (*b*).

Release by judgment creditor.

But where a judgment creditor concurs in a deed of assignment of the debtor's property to a trustee for the creditors generally, and of release to the debtor, the benefit of the judgment may be kept alive by apt words, so as to maintain its priority against a subsequent judgment creditor not a party to the deed (*c*).

Payment of interest by tenant for life in excess of rents, &c.

If a tenant for life pays off a mortgage, the fact that he had paid interest much beyond what the rents and profits of the estate would have discharged, is a demonstration *primâ facie* that, though tenant for life, he meant the charge, on being paid off, to merge so as to discharge the estate (*d*).

Presumption of merger rebutted by consideration of benefit to estate.

The general presumption as to merger of a charge where no intention for or against it is indicated expressly or by implication from conduct, is liable to be rebutted, if it is clearly for the interest of the owner of the inheritance (*e*), or of his creditors (*f*), that the charge should be kept on foot. For where the owner of the charge and inheritance has not expressly or impliedly indicated any intention that the charge shall be merged or otherwise, it is reasonable to infer that he intended that course to be followed which would be most for his own benefit (*g*).

Circumstances may be taken into account.

Thus the circumstances of the transaction as affecting the interests of the owner may be taken into account so as to support or rebut the presumption of merger. Where a person claiming to be entitled to an equity of redemption, but whose title is disputed, pays off the mortgage and takes a reconveyance, an intention to keep the mortgage alive will be presumed, as it cannot be supposed that he intended to benefit the person who was seeking to impeach his title (*h*).

Mistake.

Merger of a charge on the inheritance of the property charged

(*b*) *Farrow* v. *Rees*, 4 Beav. 18.

(*c*) *Solly* v. *Forbes*, 2 Br. & B. 38; *Squire* v. *Ford*, 9 Ha. 47; *Green* v. *Wynn*, L. R. 7 Eq. 28.

(*d*) *Jones* v. *Morgan*, 1 Bro. C. C. 205.

(*e*) *Gwillim* v. *Holland*, cited 18 Ves. 393; *Chester* v. *Willes*, Amb. 246; *Thorne* v. *Cann*, (1895) A. C. 11, at p. 19; *Capital and Counties Bank* v. *Rhodes*, (1903) 1 Ch. 631, C. A.

(*f*) *Powell* v. *Morgan*, 2 Vern. 290.

(*g*) *Davis* v. *Barrett*, 14 Beav. 542; *Ingle* v. *Vaughan-Jenkins*, (1900) 2 Ch. 368. But see *Manks* v. *Whiteley*, (1912) 1 Ch. 735.

(*h*) *Re Pride, Shackell* v. *Colnett*, (1891) 2 Ch. 135.

will not be presumed, from dealings with the property which otherwise might be deemed to indicate such intention, if it appears that these dealings were effected by the owner, in ignorance of his rights (*i*).

Fraud.

Where a mortgagee purchases the equity of redemption, the general rule that the mortgage will merge will be excluded if the mortgagee's interests will be prejudiced as against a puisne incumbrancer by reason of fraud of the vendor-mortgagor, or if the incumbrancer has been guilty of negligence in taking his security (*k*).

On the other hand, merger will be presumed where it would be a fraud to keep on foot a mortgage against a subsequent incumbrancer (*l*).

Equivocal indications of intention.

Of course, the rule that the interest of the party or his creditors will determine the question of merger or no merger, will apply when expressions or indications from conduct as to intention are equivocal (*m*), but not where they are wholly absent (*n*).

Presumption of merger in case of lunatics;

There is no equity in this respect as between the real and personal representatives, who must take as fortune has directed; and accordingly in the case of a lunatic becoming entitled to a charge on his estate, it was held, as between the heir and next of kin of the lunatic, that the charge was merged, though it would have been otherwise if it had been more beneficial to the lunatic to keep the charge alive, as if wanted for the payment of debts (*o*).

It seems to have been considered by Lord St. Leonards (*p*), after an elaborate review of the authorities, that if the Court in the exercise of a prudent management ordered payment of the charge out of the lunatic's property, by means of savings out of the real estate, the heir ought to hold free from the charge; but where real estate, subject to a mortgage, descended upon a lunatic, and the mortgage was, by an order in lunacy, paid off out of the personalty, on the death of the lunatic the amount

(*i*) *Burrell* v. *Egremont*, 7 Beav. 205; *Buckinghamshire* v. *Hobart*, 3 Swanst. 186.

(*k*) *Worthington* v. *Morgan*, 16 Sim. 547.

(*l*) *Re Gibbon*, (1909) 1 Ch. 367.

(*m*) *Swabey* v. *Swabey*, 15 Sim. 106, 502.

(*n*) *Manks* v. *Whiteley*, (1912) 1 Ch. 735.

(*o*) *Compton* v. *Oxenden*, 4 Bro. C. C. 397. See *Re Drax*, (1903) 1 Ch. 781, C. A.

(*p*) *Lord Leitrim* v. *Enery*, 6 Ir. Eq. R. 357; following *Exp. Grimstone*, Amb. 706; *Exp. Hinde*, Amb. 706, n.

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was directed to be raised out of the real estate, and paid to the administrator as personalty (*q*).

in case of infants.

Where debts of a testator have been paid by the Court out of the income of an infant tenant in tail, a merger of the charge cannot be presumed (*r*).

v.—**What will exclude Merger as against subsequent Incumbrancers.**—No merger will generally be presumed, in the absence of evidence of contrary intention, where a charge paid off or acquired by the owner of the equity of redemption is paramount to subsequent incumbrances, unless such incumbrances were created by the owner himself, so that he is personally liable to pay them.

If a purchaser pays off a charge without showing an intention to keep it alive, still, if its continuance as an existing charge is beneficial to him, it will be treated as subsisting unless an intention to the contrary can be inferred (*s*).

Keeping alive charge paid off.

But according to some of the older cases and according to *Manks* v. *Whiteley* (*t*), some indication of intention is necessary. Care should therefore be taken to keep the paramount charge alive by an apt mode of conveyance, or by express declaration: as, unless the intention to keep the charge on foot is indicated, expressly or by implication, from conduct or the circumstances of the transaction, the Court cannot give relief so as to entitle the person paying off the charge to the benefit of it as against subsequent incumbrancers. Thus, in a case in which a person having become the purchaser of an estate which was subject to two mortgages, nine years afterwards paid off the first mortgage, and took a conveyance of the legal estate from the first mortgagee to a trustee for himself, but without a declaration of intention to keep alive the charge; and by a deed of even date, he and his trustee, in consideration of a sum of money, part of which was applied in discharge of the first mortgage, granted an annuity to a party who had constructive notice of the second mortgage: it was decided that the second mortgagee had become the first incumbrancer (*u*).

(*q*) *Re Leeming*, 3 De G. F. & J. 43.

(*r*) *Alsop* v. *Bell*, 24 Beav. 451.

(*s*) *Liquidation Estates* v. *Willoughby*, (1896) 1 Ch. 726, per Lindley, L.J.

(*t*) (1912) 1 Ch. 735.

(*u*) *Parry* v. *Wright*, 5 Russ. 142; *Searle* v. *Colt*, 1 Y. & C. C. C. 36. And see *Brown* v. *Stead*, 5 Sim. 535;

The consideration of benefit does not, however, apply where the owner is personally liable to pay the charge (*x*). A mortgagor who pays off an incumbrance created by himself cannot set it up against a subsequent incumbrancer or creditor (*y*); and this applies equally to a case where an existing incumbrancer or creditor ranks *pari passu* with the incumbrancer paid off (*z*).

Purchase of equity of redemption by mortgagee lets in mesne incumbrancer.

Similarly, if the first mortgagee with notice of the second mortgage purchase the equity of redemption, the second mortgage becomes the first charge on the estate (*a*), and generally where the prior incumbrancer purchases the fee, or the owner of the fee purchases the prior incumbrance, the merger has the effect of letting in an intermediate incumbrancer, often contrary to the intention.

Former rule as to purchase of equity of redemption.

It was formerly considered that the purchaser of an equity of redemption could not by any means set up a prior mortgage of his own, nor a mortgage which he had got in, as against subsequent incumbrances of which he had notice (*b*). So, in *Toulmin* v. *Steere* (*c*), a person took a charge by way of redeemable annuity on lands subject to a prior mortgage; subsequently, a second mortgage was created, and the second mortgagee took a transfer of the first mortgage; the property was afterwards sold; the two mortgagees were paid off out of the purchase-money, but the annuity was not redeemed; no assignment of any of the charges was made to the purchaser, who took from the mortgagee, and other persons interested in the equity of redemption, other than the annuitant, a conveyance containing no declaration against merger: it was held that the mortgages were extinguished, so that the purchaser could not set them up against the annuitant.

Toulmin v. *Steere.*

The principle of *Toulmin* v. *Steere* has been disapproved of in several cases (*d*), and has recently been treated as no longer law (*e*). But it has never been overruled, and has been said

Smith v. *Phillips*, 1 Keen, 694; *Farrow* v. *Rees*, 4 Beav. 18; *Toulmin* v. *Steere*, *inf.*

(*x*) *Post*, p. 1468.

(*y*) *Otter* v. *Vaux*, 6 D. M. & G. 638, 643.

(*z*) *Re Tasker & Sons*, (1905) 2 Ch. 587; *post*, p. 1468.

(*a*) *Greswold* v. *Marsham*, 2 Ch. Ca. 170; *Parry* v. *Wright*, 5 Russ. 142; *Mackenzie* v. *Gordon*, 6 Cl. & F. 883.

(*b*) *Mocatta* v. *Murgatroyd*, 1 P. Wms. 393; *Greswold* v. *Marsham*, 2 Ch. Ca. 170.

(*c*) 3 Mer. 210.

(*d*) *Stevens* v. *Mid-Hants Rail. Co.*, L. R. 8 Ch. 1064, 1069; *Thorne* v. *Cann*, (1895) A. C. 11, at p. 16.

(*e*) (1896) 1 Ch. 726.

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to be still binding, though it will not be extended, and it seems to be confined to cases in which the purchaser had notice, actual or constructive, of the subsequent incumbrance (*f*). So far as it decides that a purchaser may subsequently and without any indication of intention at the time of discharging an incumbrance, treat the incumbrance as kept alive, it should not be followed (*g*).

Effect where property is charged with debts, &c.

On the principle that the interest of the party is to be considered, where there is no sufficient indication of intention, merger of a paramount charge will generally be excluded, if the estate comes to the owner of the charge subject to a charge of debts and legacies under the will of a former owner (*h*); unless, as it would seem, the prior incumbrancer takes directly by devise under the will (*i*).

Intention not implied contrary to terms of deed.

If an intention to keep alive a charge is inconsistent with the intention of the parties as indicated by the deed of conveyance, such intention will not be implied merely because the assignee of the mortgage might, by keeping the charge alive, assert a doubtful claim against third parties; nor because he afterwards finds that it would have been better for him to keep the charge alive (*k*).

Trusts.

There will be no merger if it would prevent the operation of a trust; thus an annuity charged on an estate for the separate use of a married woman will not merge in a life estate to her in the same property (*l*).

Exception from rule as to benefit.

The consideration of benefit of the owner will not exclude merger of a paramount charge where the subsequent incumbrances or interests are created by himself (*m*).

Lord Macnaghten (*n*) carefully limits the doctrine of keeping alive to an owner who is not personally liable to pay, and there is no authority for extending it to an owner who is simply paying off his own debt (*o*).

(*f*) *Manks* v. *Whiteley*, (1911) 2 Ch. 448, per Parker, J.

(*g*) *Ibid.*, (1912) 1 Ch. 735, per Cozens-Hardy, M.R.

(*h*) *Forbes* v. *Moffatt*, 18 Ves. 384; *Clarendon* v. *Barham*, 1 Y. & C. C. C. 688; *Davis* v. *Barrett*, 14 Beav. 542; *Grice* v. *Shaw*, 10 Ha. 176; *Tyrwhitt* v. *Tyrwhitt*, 32 Beav. 244.

(*i*) *Swinfen* v. *Swinfen*, 29 Beav. 199.

(*k*) *Liquidation Estates Purchase Co.* v. *Willoughby*, (1898) A. C. 321; *Manks* v. *Whiteley*, (1912) 1 Ch. 735.

(*l*) *Byam* v. *Sutton*, 19 Beav. 556.

(*m*) *Johnston* v. *Webster*, 4 De G. M. & G. 474; *Re Somerset*, 55 L. T. 753.

(*n*) *Thorne* v. *Cann*, (1895) A. C. 11.

(*o*) *Re Tasker & Sons*, (1905) 2 Ch. 587, per Cozens-Hardy, L.J.

When a term is attendant upon the inheritance in trust for a Crown debtor, the Crown debt attaches upon the term as well as upon the freehold (*p*); but a purchaser who pays off a mortgage which overrides the debt of the Crown, and takes an assignment of the term to attend, will not be subject to the Crown debt, though the mortgage debt be not kept alive (*q*). Crown debt.

A mortgage may be kept alive on the principle of subrogation for the benefit of persons paying off the mortgage money, notwithstanding that the property is conveyed to the person entitled to the equity of redemption. Subrogation.

So, where the mortgage money had been called in and the equity of redemption which was trust property was in danger of being lost unless money was found to pay off the mortgage, the new lender was subrogated to the rights of the old one (*r*).

Similarly, where the element of salvage was not present, a charge was kept alive in favour of a stranger who paid it off though he had taken a new charge on part of the property (*s*).

So, where a married woman owned two properties which were together subject to a charge for 450*l.* in favour of a bank. The husband arranged with the plaintiff to advance this sum to pay off the mortgage on security of one of the properties for 300*l.* and a guarantee of the remainder. The money was advanced and the mortgage paid off, but the wife refused to execute the new mortgage. It was held, on the principle of the above cases, that the plaintiff was entitled to the benefit of the mortgage which had been paid off, and that the result was not prejudiced by the agreement for other security, or by the fact that the arrangement was made without the concurrence of the mortgagor. Her position was not affected, the only change being that she would have a different person as creditor (*t*).

(*p*) *King* v. *Smith*, Wightw. 34.
(*q*) *Rex* v. *Lamb*, M'Cl. 402.
(*r*) *Patten* v. *Bond*, 37 W. R. 373.
(*s*) *Chetwynd* v. *Allen*, (1899) 1 Ch. 353.
(*t*) *Butler* v. *Rice*, (1910) 2 Ch. 277.

Section II.

Merger of Lower in Higher Security.

Merger of simple contract debt in specialty, &c.

A merger of a simple contract debt generally takes place where a security is created for that debt between the same parties, as where a simple contract debtor gives a bond or is sued to judgment (*u*).

The general principle that where a debt is secured by bond, covenant or other specialty, the obligation by a simple contract is gone, applies, of course, to a mortgage with a covenant, and if the mortgaged property be sold and an account be taken between the mortgagor and mortgagee, that will not warrant an action of debt upon an account stated for the residue of the debt (*x*). So also where a person indebted on simple contract executed a deed of equitable charge on certain property for the debt, containing an agreement to execute a legal mortgage of the property, it was held that the deed converted the debt into a specialty debt (*y*).

No merger of simple debt where security is for debt and further advance.

There will be no merger of the original liability for a debt if the subsequent security is taken for other matters as well as the original debt. So where a simple contract creditor takes a security for the existing debt and further advances, he may, notwithstanding the taking the security, sue for the amount of the original debt (*z*). So a banker who took a bond to secure all sums already advanced or thereafter to be advanced to a customer, was held to be entitled to sue for the balance of his account as upon a simple contract debt (*a*).

Merger of prior in subsequent security of higher nature.

Similarly, where a security is originally taken for a debt, that security will be merged and extinguished if a security of a higher nature is afterwards taken in respect of the same debt.

So, where a railway company issued debentures binding themselves to pay a principal sum within a year with interest at six per cent., and in default a debenture holder recovered judgment for the principal, interest and costs; it was held that

(*u*) Per Lord Ellenborough in *Drake* v. *Mitchell*, 3 East, 258; *Pudsey's Case*, cited 2 Leon. 110.

(*x*) *Middleditch* v. *Ellis*, 17 L. J. Ex. 365.

(*y*) *Saunders* v. *Milsome*, L. R. 2 Eq. 573.

(*z*) *Norfolk Rail. Co.* v. *Macnamara*, 3 Exch. 628.

(*a*) *Holmes* v. *Bell*, 3 Man. & Gr. 213.

the original debt was merged in the judgment; and that the debenture holder was only entitled to interest on the judgment at four per cent (*b*).

Merger of equitable charge in legal mortgage.

Where a formal legal mortgage is executed of property comprised in a prior equitable charge by deposit of deeds to secure the same debt, the prior charge will be merged in and extinguished by the formal security, except so far as expressly kept alive thereby. So, where a solicitor took a deposit of a policy to secure his costs, and subsequently made advances, and took an assignment of the policy to secure them, the deed saying nothing about costs, it was held that the possession under the deposit was merged in the possession under the deed, and that the policy was a security for the advances only (*c*).

If there be a joint and separate bond and a joint warrant of attorney on which judgment is signed, the bond is merged, and the separate security gone (*d*).

Both securities must be between same parties.

A lower will not merge in a higher security unless they be between the same parties; so the interposition of a trustee will prevent the higher security from operating as a merger (*e*). It is no bar to an action on a promissory note that a warrant of attorney has been given to a trustee for the payee of the note, and judgment has been entered up thereon (*f*).

Mortgage to secure bills at maturity.

Where a mortgage is taken to secure bills of exchange or promissory notes at maturity, care must be taken that the remedy on them is not merged by a covenant to pay, which in such case should be with a trustee.

Remedies must be co-extensive.

Even though the specialty be taken subsequently to the simple contract, the remedy upon the latter will not be destroyed unless the remedy on the specialty be co-extensive (*g*). And to work a merger the remedy given by the higher security must be co-extensive with that given by the original lower security, and even then the merger will be prevented

(*b*) *Re European Central Rail. Co.*, 4 Ch. D. 33, C. A.

(*c*) *Vaughan* v. *Vanderstegen*, 2 Drew. 289.

(*d*) *Exp. Christie*, Mont. & Bl. 352.

(*e*) *Holmes* v. *Bell*, 3 Man. & Gr. 213; *Emes* v. *Widdowson*, 4 C. & P. 151. See *Owen* v. *Homan*, 3 Mac. & G. 407; *Locking* v. *Parker*, L. R. 8 Ch. 30.

(*f*) *Bell* v. *Banks*, 3 Man. & Gr. 258.

(*g*) *Twopenny* v. *Young*, 3 B. & C. 208; *Ansell* v. *Baker*, 15 Q. B. 20; *Sharpe* v. *Gibbs*, 16 C. B. N. S. 527; *Boaler* v. *Mayor*, 11 Jur. N. S. 565; *Westmoreland, &c. Co.* v. *Feilden*, (1891) 3 Ch. 15.

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if it appears to be the intention of the parties that the original security should remain in force, although a surety under the original instrument is not a party to the giving of the subsequent higher security (*h*). And the principle of *transit in rem judicatam* only relates to the particular cause of action in which the judgment is recovered, and does not operate upon any concurrent remedy which the creditor may have, until it be made productive in satisfaction to the party (*i*).

Subsequent security must be effectual.

In order to operate as a merger, the subsequent security must be effectual. So where a debtor gave an equitable charge to secure his debt containing an agreement to execute a legal mortgage, and subsequently executed such mortgage accordingly, which was vitiated by an intervening act of bankruptcy, it was held that the original equitable security was not extinguished (*k*).

No merger by taking another security on same funds.

A creditor, having a charge on certain funds of his debtor for a part of his debt, does not, it seems, necessarily extinguish that charge by taking a subsequent charge on the same fund for the whole of the debt; and according to *Miln* v. *Walton* (*l*), and the observations in the judgment, a creditor does not merge his charge on the debtor's fund by taking another security on the same fund, for both the sum so secured and another sum either due to himself or a third person.

Merger excluded by contrary intention.

Express or implied indications of intention to the contrary will prevent merger of the original debt or security. So, a recital in the subsequent security that it is given by way of further or additional security will exclude merger (*m*). And an expression in an original security of an intention that its terms shall continue during the subsistence of the debt, will apparently have the same effect.

Rate of interest after judgment.

So the merger of a security in a judgment does not affect the rate of interest if the intention appears that the original interest was to continue so long as the debt remained unpaid. Where a security was expressly given to cover interest at 7 per cent. as long as anything remained on the security, it was held that

(*h*) *Oriental Financial Corp.* v. *Overend, Gurney & Co.*, L. R. 7 Ch. 147; aff. on other points, L. R. 7 H. L. 348. See *Bell* v. *Banks*, 3 Man. & Gr. 258.

(*i*) *Drake* v. *Mitchell*, 3 East, 251, 258; *Bell* v. *Banks*, *sup.*

(*k*) *Exp. Harvey*, 1 M. & Chit. 261.

(*l*) 2 Y. & C. C. C. 354.

(*m*) *Twopenny* v. *Young*, 3 B. & Cr. 208; *Exp. Pennell*, 2 M. D. & De G. 273.

though the judgment discharged the personal covenant, yet, that so long as any money could be recovered in an action for foreclosure or redemption, any property comprised in the security remained charged to cover the difference between 7 and 4 per cent. (*n*); it being a different question where interest is claimed in an action on the covenant, and where it is claimed in a foreclosure or redemption suit as the price of redemption (*o*). The rule is that though a covenant for payment of principal will merge in a judgment, so that the interest after judgment will be reduced to 4 per cent., yet if the mortgage is in such a form that the property cannot be taken out of the hands of the mortgagee without payment of principal and full interest, then the mortgagee will be entitled to full interest, notwithstanding judgment on the covenant (*p*).

Indication of contrary intention by conduct, &c.

A contrary intention so as to exclude merger may also be shown by the acts of the parties, or generally by the circumstances of the transaction. So where a lessee holding under a lease for forty-six years, subject to a lease in possession for twenty years, deposited his lease by way of equitable mortgage, and, having subsequently purchased the residue of the term to which his lease was subject, he deposited that lease also with the same party to secure a further sum; it was held that the circumstances of the transaction indicated an intention that the former security should not merge in the latter, and that both deposits were good equitable mortgages for the sums thereby respectively secured (*q*).

(*n*) *Popple* v. *Sylvester*, 22 Ch. D. 98. See also *Cook* v. *Fowler*, L. R. 7 H. L. 27; *Re Roberts*, *Goodchap* v. *Roberts*, 14 Ch. D. 49, C. A.; *Exp. Fewings*, *Re Sneyd*, 25 Ch. D. 338, C. A.; *Arbuthnot* v. *Bunsilall*, 62 L. T. 234.

(*o*) *Exp. Fewings*, *Re Sneyd*, *sup.* at p. 350.

(*p*) *Economic Life Ass. Soc.* v. *Usborne*, (1902) A. C. 147.

(*q*) *Exp. Whitbread*, 2 M. D. & De G. 415.

Part IX.

CONTRACT SECURITIES (OTHER THAN MORTGAGES) FOR DEBTS AND LOANS.

CHAPTER LXIII.

PLEDGES.

Section I.

Ordinary Pledges or Pawns.

Definition of pledge.

i.—Nature and Effect of a Pledge or Pawn.—A pledge or pawn (for these words are used indifferently in English law to express the same kind of transaction) has been defined by Sir William Jones as "a bailment of goods by a debtor to his creditor to be kept till the debt is discharged" (*a*). Lord Holt, discussing the different kinds of bailments in *Coggs* v. *Bernard* (*b*) (the leading case on the subject), says that a pledge is "when goods or chattels are delivered to another as a pawn, to be a security to him for money borrowed of him by the bailor; and this is called, in Latin, *vadium*, and in English, a pawn or pledge."

Pothier gives a somewhat similar definition, saying that a pledge or pawn is a contract by which the debtor gives to his creditor a thing to detain as a security for his debt which the creditor is bound to return when the debt is paid (*c*). Mr. Justice Story (*d*) points out that though these definitions are in the main sufficiently descriptive of the nature of the contract of pledge, they are limited to cases where a thing is given as a mere security for a debt, but that a pawn may well

(*a*) Jones on Bailments, 117.
(*b*) 2 Ld. Raym. 909, 913.
(*c*) Pothier, de Nantissement, Art. Prelim. n. 2.
(*d*) Story on Bailments, s. 286.

be given as a security for any other engagement; he therefore defines pledge to be "a bailment of personal property as a security for some debt or engagement."

Debt essential to pledge.

It is of the essence of the contract that the thing should be delivered as a security for some debt or engagement of the pledgor or some other person, and it may be for any debt past or future, and upon condition or absolutely, and for a limited or indefinite time (*e*); and it may be express or implied, and for any engagement or contract whatever (*f*).

Delivery essential to pledge.

A pledge or pawn being a species of bailment, actual or constructive delivery of the thing pledged is an essential element of the contract; without delivery, the pledgee obtains no right of property in the thing; and if he parts with the thing he generally loses the benefit of his security (*g*).

Pledge and mortgage distinguished.

Herein lies an important distinction between a pledge and a mortgage. Transfer of possession is, as has been seen, not essential to, and in practice seldom accompanies, a mortgage transaction, which is effected by means of a conveyance or assurance of the title.

The pledgee has only a special property in the thing pledged, and, though he may sell, he cannot foreclose.

Difference as to title of mortgagee and pledgee.

A mortgage passes the whole legal interest conditionally to the mortgagee. If the thing mortgaged is not redeemed at the specified time, the mortgagee's title becomes absolute at law, but in equity enforceable only by foreclosure or sale, and in the meantime subject to the mortgagor's right to redeem. So, when there is a deposit of title deeds, the Court treats that as an agreement to execute a legal mortgage, and, therefore, as carrying with it all the remedies incident to such a mortgage (*h*). But in the case of a pledge, the pledgee has a special property only in the goods pledged to detain them for his security, the general property continuing in the pledgor (*i*).

Redemption of pledge.

It has been seen (*k*) that the Courts of Equity found it necessary, in order to mitigate the hardship arising from a strict enforcement of the express terms of a legal mortgage, to impose upon the mortgagee the obligation to allow the mortgagor to

(*e*) *Exp. Ockenden*, 1 Atk. 236; *Coles* v. *Jones*, 2 Vern. 692.
(*f*) Story on Bailments, s. 300.
(*g*) *Ryall* v. *Rolle*, 1 Atk. 164. See *Reeves* v. *Capper*, 5 Bing. N. C. 140, 141; *Doherty* v. *Kennedy*, (1912) 1 Ir. R. 349.
(*h*) *Carter* v. *Wake*, 4 Ch. D. 605.
(*i*) *Jones* v. *Smith*, 2 Ves. Jun. 372, at p. 378; *Lickbarrow* v. *Mason*, 2 T. R. 63.
(*k*) *Ante*, p. 11.

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redeem on payment of principal, interest, and costs, notwithstanding that a forfeiture had been incurred at law by non-payment on the day named in the contract. In the case of pledges, however, no such interference has been necessary. According to the well-settled terms of a contract of pledge, even if a time is fixed for redemption, the effect is merely to render exerciseable, on default in payment at the appointed time, the pledgee's right of sale; but if he does not choose to exercise the power he will still retain the chattels as a pledge subject to redemption on tender of the money due, when his special property will be determined (*l*) and he will be compellable to restore the property to the pledgor (*m*).

Neither prescription nor the Statutes of Limitation run against the right of redemption after the day fixed for payment (*n*). However, after a long lapse of time, if no claim for a redemption is made, the right will be deemed to be extinguished; and the property will be held to belong absolutely to the pledgee (*o*).

In the case of an ordinary pledge, where no time is fixed for redemption, it has been held that the pledgor may redeem at any time during his own life, but that no right of redemption will be allowed after his death, the right being personal to him (*p*).

Foreclosure.

Inasmuch as the contract of pledge is construed and enforced in strict accordance with its terms and the legal rights of the parties, it follows that a decree for foreclosure cannot be made at the instance of a pledgee, for foreclosure is merely the removal of a stop put by equity on the enforcement by a creditor of his legal remedies under his security (*q*). If, however, a pledgor brings an action for redemption against the pledgee, who refuses to restore the property, the dismissal of such an action is tantamount to foreclosure; and the usual decree orders that the pledgor shall redeem within a certain time or be foreclosed (*r*).

Tender revests goods in pledgor.

Upon tender by the pledgor of the debt, the property, not-

(*l*) *Martindale* v. *Smith*, 1 Q. B. 389; *Bank of New South Wales* v. *O'Connor*, 14 App. Ca. 273 at p. 282.

(*m*) See Story, s. 346.

(*n*) *Kemp* v. *Westbrook*, 1 Ves. Sen. 278.

(*o*) Story, s. 346. See *Lockwood* v. *Ewer*, 2 Atk. 303, a case of mortgage.

(*p*) *Ratcliff* v. *Davis*, 1 Bulstr. 29; Yelv. 178; *Kemp* v. *Westbrook*, *sup.*

(*q*) *Carter* v. *Wake*, 4 Ch. D. 605; *Harrold* v. *Plenty*, (1901) 2 Ch. 314; *Stubbs* v. *Slater*, (1910) 1 Ch. 632.

(*r*) See, for forms of order, Seton on Decrees (6th ed.), p. 2000.

withstanding the pledgee's refusal to accept payment, is revested immediately without claim or reconveyance (*s*). A pledgor may sue for goods detained after tender (*t*); but it seems that the property would not be revested on tender by one of several joint owners (*u*). The necessity of actual payment on tender in order to revest the property in the pledgor is not done away with by the fact that the pledgee has set up a claim to the absolute ownership of the goods (*x*).

ii.—**Delivery of Possession.**—Delivery of possession may be either actual or constructive and symbolic. What is sufficient to constitute a constructive delivery is sometimes a matter of nicety (*y*).

Constructive delivery.

If actual delivery be from circumstances impossible, constructive delivery will be sufficient (*z*). So, in the case of an assignment of a ship at sea (*a*), or in a foreign port (*b*), the delivery of the muniments of title (attended with such formalities as the statute law requires) will be sufficient; so also the delivery of bills of lading of goods at sea (*c*), or warrants of goods *in transitu* (*d*).

Similarly, where actual delivery has been made as nearly as may be, as where goods are bulky and are in a warehouse and the key of the warehouse is delivered (*e*).

So, also, where goods were stored in a customs warehouse, subject to customs, freight, and storage, a note of the pledge thereof, entered in the book of the customs officer, was held to be a sufficient constructive delivery (*f*).

The possession from the symbolical delivery by a key or bill of lading cannot, it would seem, be affected by possession being gained by means of a false key or false bill of lading (*g*).

(*s*) Noy, 137; *Ratcliff* v. *Davis*, 1 Bulstr. 29; Cro. Jac. 244; *Coggs* v. *Bernard*, Ld. Raym. 909; *Isaack* v. *Clark*, 2 Bulstr. 306; *Ryall* v. *Rowles*, 1 Atk. 167.

(*t*) 5 Com. Dig. 148A.

(*u*) *May* v. *Harvey*, 13 East, 197; *Harper* v. *Godsell*, L. R. 5 Q. B. 422.

(*x*) *Yungmann* v. *Briesmann*, W. N. (1892) 162.

(*y*) See *Martin* v. *Reid*, 11 C. B. N. S. 730, 739; *Donald* v. *Suckling*, L. R. 1 Q. B. 587.

(*z*) *James* v. *Whitbread*, 11 C. B. 406; *Maughan* v. *Sharpe*, 17 C. B. N. S. 483; *Doherty* v. *Kennedy*, (1912) 1 Ir. R. 349; and cases cited *inf.*

(*a*) *Atkinson* v. *Maling*, 2 T. R. 462.

(*b*) *Exp. Batson*, 3 Bro. C. C. 362.

(*c*) *Brown* v. *Heathcote*, 1 Atk. 160; *Barber* v. *Meyerstein*, L. R. 4 H. L. 317.

(*d*) *Exp. Flyn*, 1 Atk. 185.

(*e*) *West* v. *Skip*, 1 Ves. Sen. 244; *Smith* v. *Smith*, Stra. 255. See *Meyerstein* v. *Barber*, L. R. 2 C. P. 38, at p. 52; *Hilton* v. *Tucker*, 39 Ch. D. 669.

(*f*) *Young* v. *Lambert*, L. R. 3 P. C. 142.

(*g*) *Meyerstein* v. *Barber*, *sup.*

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Delivery of part of goods in name of whole.

Again, the delivery of part of goods may be a delivery in the name of the whole; and, if such is shown to be the intention of the parties, partial delivery may constructively operate as a sufficient delivery of the whole (*h*); but it seems that the burden of proof lies on the party asserting that such was the intention (*i*). It has been laid down that "the delivery of part operates as a constructive delivery of the whole only where the delivery of part takes place in the course of the delivery of the whole, and the taking possession by the buyer of that part is the acceptance of constructive possession of the whole" (*k*).

Constructive delivery by warrants or orders.

Warrants or orders for delivery of goods, by indorsement or otherwise, are documents of title, the delivery of which may pass the property in the goods by way of pledge without physical change of possession (*l*). So where, upon a verbal agreement for a loan on the security of furniture belonging to the borrower which was stored in a warehouse, the borrower signed and handed to the warehouseman a delivery order, it was held that the transaction was a pledge, and that the delivery order was equivalent to actual possession by the lender, not requiring registration as a bill of sale (*m*). But wharfingers' certificates that goods are lying at a specified place ready for delivery are not sufficient to pass the property in the goods (*n*).

Delivery subsequent to advance.

It is not essential to a pledge that the delivery of the goods should be contemporaneous with the advance; it is sufficient if the goods are delivered within a reasonable time after the advance, in accordance with a contract to pledge (*o*).

Pledge must be by or with consent of owner.

iii.—**Title of Pledgor.**—It is not indispensable that the pledge should belong to the pledgor; it is sufficient if it is pledged with the authority or consent of the owner (*p*). The pledgor

(*h*) *Crawshay* v. *Eades*, 1 B. & Cr. 181; *Tanner* v. *Scovell*, 14 M. & W. 28; *Hammond* v. *Anderson*, 1 B. & P. N. R. 69.

(*i*) *Kemp* v. *Falk*, 7 App. Ca. 573, 586.

(*k*) Per Willes, J., in *Bolton* v. *Lancashire and Yorkshire Rail. Co.*, L. R. 1 C. P. 431, at p. 440.

(*l*) *Charlesworth* v. *Mills*, (1892) A. C. 231; *Doherty* v. *Kennedy*, (1912) 1 Ir. R. 349.

(*m*) *Grigg* v. *National Guardian Ass. Co.*, (1891) 3 Ch. 206.

(*n*) *Gunn* v. *Bolckow, Vaughan & Co.*, L. R. 10 Ch. 491.

(*o*) *Hilton* v. *Tucker*, 39 Ch. D. 669. See, as to refusal to deliver up possession of goods pursuant to contract, *West* v. *Skip*, 1 Ves. Sen. 239, at p. 244.

(*p*) Story on Bailments, s. 291. See *Nahmaschinen Fabrik Gesellschaft* v. *Pickford & Co.*, W. N. (1888) 140.

impliedly undertakes that he has an interest in the pledge, and that it shall be made effectual to answer the obligation (*q*).

But an executor can only pledge goods as executor, and if he does not disclose his executorship he will confer no title on the pledgee (*r*).

A power of attorney to sell and dispose of government securities does not authorize the donee to pledge them (*s*).

A pledge of goods by a person in possession, who is not the true owner, will in all cases be good as between the parties themselves, but the question whether the true owner can assert his own superior right of property will depend upon the circumstances attending the transaction (*t*).

Sale of Goods Act, 1893.

If goods are sold or agreed to be sold, but the sale has not been completed by reason of the goods not having been delivered to the purchaser, or of the purchase-money not having been paid, the seller or purchaser, as the case may be, in possession of the goods, can effectually pledge them to a person acting *bonâ fide* and without notice, so as to oust, to the extent of the security, all claim or lien of the other party to the sale.

By the Sale of Goods Act, 1893 (*u*), it is enacted as follows:—

Seller or buyer in possession after sale.

Sect. 25.—"(1.) Where a person having sold goods continues or is in possession of the goods or of the documents of title to the goods, the delivery or transfer to that person, or by a mercantile agent acting for him, of the goods or documents of title under any sale, pledge, or other disposition thereof, to any person receiving the same in good faith and without notice of the previous sale, shall have the same effect as if the person making the delivery or transfer were expressly authorized by the owner of the goods to make the same.

"(2.) Where a person having bought or agreed to buy goods obtains, with the consent of the seller, possession of the goods or the documents of title to the goods, the delivery or transfer by that person, or by a mercantile agent acting for him, of the goods or documents of title, under any sale, pledge, or other disposition thereof, to any person receiving the same in good faith and without notice of any lien or other right of the original seller in respect of the goods, shall have the same effect as if the person making the delivery or transfer were a mercantile agent in

(*q*) Story on Bailments, s. 311. See per Pollock, C.B., in *Cheeseman* v. *Exall*, 6 Exch. 341.

(*r*) *Solomon* v. *Attenborough*, (1912) 1 Ch. 451, C. A.

(*s*) *Jommenjoy Coondoo* v. *Watson*, 9 App. Ca. 561, P. C.

(*t*) Story on Bailments, s. 291; *Garth* v. *Howard*, 5 C. & P. 346, 350.

(*u*) 56 & 57 Vict. c. 71.

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possession of the goods or documents of title with the consent of the owner.

"(3.) In this section the term 'mercantile agent' has the same meaning as in the Factors Act."

The hirer, under a hire-purchase agreement, is not a person who has "agreed to buy goods" unless he is under a binding agreement to buy them (*x*). The words "obtains with the consent of the seller" have been considered in a recent case (*y*).

In cases, other than those of incomplete sales of goods, the statute does not apply; and accordingly, in such cases, as against the real owner, the pawnee will not acquire a special property in the chattel if the person who assumes to pledge be himself without title, for the pawnee can have no greater right than the pawnor (*z*). A custom that a pledge by a stranger in market overt in London binds the owner is bad (*a*).

Pledges by partners.

A partner having power to borrow has an implied authority to pledge the chattels of the firm to secure the payment of a present loan or an antecedent debt (*b*). And one of several persons, who join in the purchase of goods to be sold for their common profit, has a similar authority to bind his co-adventurers by pledge of the goods (*c*).

Fraudulent possession.

The mere possession, obtained through false representations, of a document of title to a chattel will not support the title of a *bonâ fide* pawnee of the chattel for value, though without notice of the pledgor's want of title (*d*); and even where the pawnor remaining in possession for a limited purpose under the original contract to pawn, or by the fraudulent use of a document of title affects to pledge the chattel to another, the right remains in the first pawnee, though the second has actually obtained possession and sold the chattel (*e*).

(*x*) *Helby* v. *Matthews*, (1895) A. C. 471.

(*y*) *Cahn* v. *Pockett Steam Packet Co.*, (1899) 1 Q. B. 643, C. A.

(*z*) *Hooper* v. *Ramsbottom*, 4 Camp. 121; *Cheeseman* v. *Exall*, 6 Exch. 341; *Waller* v. *Hanger*, 3 Bulstr. 17; *Wookey* v. *Pole*, 4 B. & Ald. 1, at p. 15.

(*a*) Shep. Abr. Customs; Plowd. 243; Bro. Abr. Prerog. 5; Fitzh. Custom, pl. 2; *Hartopp* v. *Hoare*, 3 Atk. 44, 52.

(*b*) *Exp. Bonboners*, 8 Ves. 540; *Butchart* v. *Dresser*, 4 De G. M. & G. 542; *Brownrigg* v. *Rae*, 5 Exch. 489; *Gordon* v. *Ellis*, 7 Man. & Gr. 607.

(*c*) *Reid* v. *Hollingshead*, 4 B. & Cr. 867; *Re Goller*, 1 Rose, 297. See 53 & 54 Vict. c. 39, s. 5.

(*d*) *Kingsford* v. *Merry*, 1 H. & N. 503; *Lamb* v. *Attenborough*, 1 B. & S. 831.

(*e*) *Reeves* v. *Capper*, 5 Bing. N. C. 136; *Barber* v. *Meyerstein*, L. R. 4 H. L. 317, at p. 331.

The general rule at common law is that, to make a sale or pledge valid against the owner of the goods sold or pledged, it must be shown that the seller or pledgor had authority from the owner to sell or pledge as the case may be. If the owner has so acted as to clothe the seller or pledgor with apparent authority to sell or pledge, he is at common law precluded from denying that he had given such authority, and the result was the same as if he had really given it (*f*).

Where a contract for the sale of chattels is voidable by the seller for fraud, and before the seller elects to avoid the sale the buyer pledges the chattels to secure an advance, the onus is on the seller to prove that the pledgee took with notice of the fraud (*g*).

The sale by a person allowed by the true owner to have possession of the goods, so that he is able to hold himself out as owner, probably only binds the true owner (except in cases of incomplete sales) where the possessor, from the nature of his employment, had *primâ facie* a right to sell (*h*).

A mortgagor of stock in trade left in possession thereof to enable him to carry on his business has no power to pledge the goods, by reason of the mortgagee's acquiescence in his retaining possession thereof.

Nor is the mortgagor the agent for sale of the mortgagee within the Factors Acts (*i*).

Where the circumstances are such as to put the pledgee on inquiry, he will not acquire a good title to goods or securities against the true owner, unless he has satisfied himself by reasonable evidence that the pledgor has *primâ facie* authority to pledge them (*k*).

Pledge by limited owner.

If the pledgor has only a limited title to the thing, as for life or for years, he may still pawn it to the extent of his title; but when that expires the pledgee must surrender it to the person who succeeds to the ownership (*l*). And the bailee of goods of tenants in common cannot, by direction of one of them, justify a pledge of the whole (*m*).

(*f*) Per Blackburn, J., in *Cole* v. *North Western Bank*, L. R. 10 C. P. 354, at p. 363.

(*g*) *Whitehorn Bros.* v. *Davison*, (1911) 1 K. B. 463.

(*h*) *Higgons* v. *Burton*, 26 L. J. Ex. 342.

(*i*) *Joseph* v. *Webb*, 1 C. & E. 262.

(*k*) *Mulville* v. *Munster and Leinster Bank*, 27 L. R. Ir. 379.

(*l*) *Hoare* v. *Parker*, 2 T. R. 376; *Hooper* v. *Ramsbottom*, 4 Camp. 121; *McCombie* v. *Davies*, 7 East, 5.

(*m*) *Barton* v. *Williams*, 5 B. & Ald. 395.

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The same rule applies to any other special interest or special property in a thing, such as a lien or a right by a former pledge, which may be again pledged to the extent of such lien or right, although not beyond it (*n*).

iv.—**The Subject-matter of Pledges.**—Inasmuch as delivery of possession, actual or constructive, is an essential element of pledge, only such things as are capable of such delivery can be the subject of pledge (*o*). These are ordinarily goods and chattels; but money and negotiable instruments may, by the common law, be delivered in pledge (*p*).

Pledge of negotiable securities.

If the pledge is of mere current coin, or of a negotiable security capable in its nature of passing by delivery, then, if the pledgee sells it to a *bonâ fide* purchaser without notice, the latter acquires an absolute property in the pledge (*q*); but if a negotiable note or other security contains on it any intimation that it belongs to, or that it is for the use or benefit, of another, as if the words "as trustee" were on it, then it is incapable of being pledged for the use of the holder (*r*).

Negotiable securities.

A person in lawful possession of negotiable securities for money may pledge them; and a pledge of such instruments taken in good faith and for value confers on the pledgee a valid title, though he takes from a person who had none (*s*). So, where a broker fraudulently pledged negotiable instruments belonging to a client, as a security for an advance with a bank, which made no inquiries, it was held that, there being no circumstances to create suspicion, the bank was entitled to realize the securities, so as to repay themselves the amount secured by the pledge (*t*).

But if the circumstances are such as to affect the pledgee with notice that the holder of the securities was not the true owner, and had no authority to deal with them, a pledge of the goods

(*n*) Story on Bailments, s. 295, ed. 8.

(*o*) *Ryall* v. *Rowles*, 1 Ves. Sen. 348, at p. 357.

(*p*) *Gorgier* v. *Mieville*, 3 B. & Cr. 45. See also *Carter* v. *Wake*, 4 Ch. D. 605; and cf. *Harrold* v. *Plenty*, (1901) 2 Ch. 314.

(*q*) *Wookey* v. *Pole*, 4 B. & Ald. 1, at p. 15.

(*r*) *Treuttel* v. *Barandon*, 8 Taunt. 100.

(*s*) *Gorgier* v. *Mieville*, 3 B. & Cr. 45; *Goodwin* v. *Robarts*, 1 App. Ca. 476; *Carter* v. *Wake*, 4 Ch. D. 605; *London Joint Stock Bank* v. *Simmons*, (1892) A. C. 201, at p. 213.

(*t*) *London Joint Stock Bank* v. *Simmons*, (1892) A. C. 201; *Bentinck* v. *London Joint Stock Bank*, (1893) 2 Ch. 120.

will create no valid security (*u*). So, also, if the holder has a limited authority to pledge the securities, and the pledgee is or ought to be aware of the limitation, the pledge will be good only to the extent of the authority (*x*).

Pledges of bills of lading.

The rule above indicated appears to be confined to negotiable securities for money, and not to apply to pledges of bills of lading (*y*). The mere indorsement and delivery of a bill of lading as security for money operates as a symbolical delivery of the goods by way of pledge, and does not pass the property in the goods to the indorsee, so as to transfer to him the liabilities in respect of the goods within the meaning of the Bills of Lading Act (*z*). And it would seem that, in such a case, the ordinary rule with regard to pledges of goods would apply, namely, that a pledgee or purchaser from a person in possession of the bill of lading cannot acquire a better title than such person had (*a*).

The pledge of a bill of lading will carry the right of possession even after the landing of the goods, so long as they have not come into the hands of the person entitled to receive them under the bill of lading (*b*).

The indorsement of and delivery of a bill of lading may, however, be accompanied by a writing so expressed as to show that, as between the parties, the contract was intended to be a mortgage, and, in the absence of fraud, such a transaction will take effect according to the intention, and be subject to the law of mortgage (*c*).

Right of pledgee to possession.

v.—Rights, Remedies, and Liabilities of Pledgee.—The pawnee acquires by the common law a special property in the thing (*d*), and is entitled to the exclusive possession of it during the time, and for the objects, for which it is pledged. If the owner or a stranger obtains wrongful possession of it, he may sue for its restitution or damages, even to the full

(*u*) See cases cited in note (*s*), and compare *Thomson* v. *Clydesdale Bank*, (1893) A. C. 282, 289.

(*x*) *Earl of Sheffield* v. *London Joint Stock Bank*, 13 App. Ca. 333.

(*y*) *Pickering* v. *Busk*, 15 East, 38; *Quieroz* v. *Trueman*, 3 B. & Cr. 342.

(*z*) 18 & 19 Vict. c. 111, s. 1; *Sewell* v. *Burdick*, 10 App. Ca. 74.

(*a*) See *ante*, p. 1480.

(*b*) Story, Bailm. s. 297; *Ryall* v. *Rowles*, 1 Atk. 165, at p. 171; *Re Westzinthus*, 5 B. & Ad. 817.

(*c*) *Sewell* v. *Burdick*, 10 App. Ca. 74. See *Bristol and West of England Bank* v. *Midland Rail. Co.*, (1891) 2 Q. B. 653, C. A.

(*d*) Jones, Bailm. 80; *Ratcliff* v. *Davis*, Cro. Jac. 244; *Coggs* v. *Bernard*, Ld. Raym. 909, 916. See Bac. Abr. Bailm. B.

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value from a stranger, although pledged for less, as he is accountable over to the owner for the excess (*e*).

The right is only effectual for the debt for which the pledge was made, and not for any other past or future debt (*f*) unless so understood by the parties (*g*). The right extends to interest on the debt, and all necessary expenses incurred about the debt (*h*).

Where the pledge is a negotiable security, such as a negotiable note, the pledgee has a right to recover and receive the money due thereon, and to sue for it in his own name (*i*).

Accretions.

The pledgee is entitled to hold every separate thing comprised in the pledge, and also whatever by natural increase becomes accessory to it, as the young of sheep born after the pledge of the flock (*k*), but not such as are substituted for them (*l*).

Custody and use of pledge.

If the pawn is of such a nature that the due preservation of it requires some use, such use is not only justifiable, but it is indispensable to the faithful discharge of the duty of the pawnee (*m*).

If the pawn is of such a nature that it will be worse for the use, such, for instance, as the wearing of clothes deposited, then the use is prohibited to the pawnee (*n*).

If the pawn is of such a nature that the keeping is a charge to the pawnee, as if it is a cow or a horse, there the pawnee may milk the cow and use the milk and ride the horse, by way of recompense (as it is said) for the keeping (*o*).

If the use will be beneficial to the pawn, or it is indifferent, it seems that the pawnee may use it, as in the case of dogs and books (*p*).

(*e*) 2 Saund. 47, n.; *Swire* v. *Leach*, 18 C. B. N. S. 479; *Donald* v. *Suckling*, L. R. 1 Q. B. 585.

(*f*) *Rushforth* v. *Hadfield*, 7 East, 224; *Demainbray* v. *Metcalf*, 2 Vern. 691.

(*g*) *Exp. Ockenden*, 1 Atk. 236; *Jones* v. *Smith*, 2 Ves. Jun. 372, 380; *Vanderzee* v. *Willis*, 3 Bro. C. C. 21. But see *Adams* v. *Claxton*, 6 Ves. 226.

(*h*) Story on Bailments, s. 306, a. But see *Somes* v. *British Empire Shipping Co.*, 8 H. L. C. 338.

(*i*) Story on Bailments, s. 321, 8th ed.

(*k*) Story on Bailments, ss. 292, 314; Dig. xx. tit. 1, *de Pignoribus*, &c. xiii.

(*l*) *Webster* v. *Power*, L. R. 2 P. C. 69.

(*m*) Jones on Bailments, 81.

(*n*) 2 Salk. 522; *Coggs* v. *Bernard*, 2 Ld. Raym. 909, 916; Jones on Bailments, 81.

(*o*) Jones on Bailments, 81. See *Bagshawe* v. *Goward*, or *Gawin*, Cro. Jac. 147; Noy, 119; *Duncomb* v. *Reeve*, Cro. Eliz. 783. See Roll. Abr. 673, P. pl. 8; 9 Vin. Abr. Distr. P. pl. 8; Com. Dig. Distr. D. 6; *Chamberlayn's Case*, 1 Leon. 220; *Mores* v. *Conham*, Owen, 123, 124; Bac. Abr. Distr. D.

(*p*) Jones on Bailments, 81.

If the use will not cause injury, and yet the pawn will thereby be exposed to extraordinary perils, then the use is impliedly interdicted (*q*).

Loss of goods.

The law requires that the pawnee should use ordinary diligence in the case of the pawn (*r*). If the goods pawned are lost after tender, then the pawnee keeping them wrongfully must be answerable for them at all events (*s*); but in case of theft, if it be occasioned by negligence, the pawnee is responsible; if without negligence, he is discharged (*t*). The lien is gone if the pledgee lose or dispose of the article pledged (*u*).

Heirlooms.

Where a tenant for life of lands settled under a will had deposited as security for a loan certain articles which were claimed by the remainderman as heirlooms, inspection of the articles was ordered on motion (*x*).

A mortgage by a reversioner of his interest in heirlooms does not require registration as a bill of sale (*y*).

Right to transfer pledge.

The pawnee may by the common law deliver over the pawn into the hands of a stranger for safe custody without consideration, or he may sell or assign all his interest in the pawn, or he may convey the same interest conditionally by way of pawn to another person, without in either case destroying or invalidating his security (*z*).

The pledgee may transfer his pledge to his own creditor, who may hold it until the debt of the original owner is discharged (*a*).

If the pawnor, in consequence of any default or conversion by the pawnee, has by an action recovered the value of the pawn, still the debt remains and is recoverable, unless in such prior action it has been deducted (*b*). It seems that by the common law the pawnee in such an action brought for the tort has a right to have the amount of his debt recouped in the

(*q*) Story on Bailments, s. 330; Jones on Bailments, 81; *Mores* v. *Conham*, Owen, 123; *Anon.*, 2 Salk. 522; *Coggs* v. *Bernard*, 2 Ld. Raym. 909, at pp. 916, 917.

(*r*) Story on Bailments, s. 332; *Coggs* v. *Bernard*, *sup.*; Jones on Bailments, 75, 83; *Vere* v. *Smith*, 1 Vent. 121.

(*s*) *Coggs* v. *Bernard*, 2 Ld. Raym. 909; *Southcote's Case*, 4 Rep. 83, b.

(*t*) Story on Bailments, s. 338; *post*, p. 1492.

(*u*) *Cooke* v. *Haddon*, 3 F. & F. 229.

(*x*) *Earl of Macclesfield* v. *Davis*, 3 V. & B. 16.

(*y*) *Re Thynne*, (1911) 1 Ch. 282.

(*z*) *Ratcliff* v. *Davis*, Cro. Jac. 244; *Mores* v. *Conham*, Owen, 123.

(*a*) Story on Bailments, s. 327. See *Donald* v. *Suckling*, L. R. 1 Q. B. 588.

(*b*) *Ratcliff* v. *Davis*, Cro. Jac. 244; Bac. Abr. Bailment, B.

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damages (*c*). Therefore, where upon non-payment on a certain day the pledgee was empowered to sell, but sold before and delivered upon that day, although it was held to be a wrongful conversion, the interest of the pledgee in the property was considered not to have been destroyed; and as it appeared that the pledgor never intended to redeem, his right to damages was treated as only nominal, and as if he had sued on a breach of contract for not keeping the pledge till the day fixed (*d*). And again, where the pawnee had re-pledged for a larger sum than was due to him on the original pawn, it was held that the first pawnor could not bring detinue against the second pawnee without tendering the amount due to the first pawnee (*e*).

The mere refusal to re-deliver the pledge to the pawnor is, however, not a conversion. It is for the jury to say whether the holder intended to apply it to his own use, to assert the title of a third person, or only to ascertain the true ownership, and in the latter case whether a reasonable time had elapsed for that purpose (*f*).

If the pawnor be not the true owner of the chattel, and have no special property in it which he may assert against the true owner, the pawnee may deliver the chattel to the latter (*g*); being, however, answerable in damages, though they may be only nominal, if he have absolutely contracted to re-deliver it to the pawnor (*h*). Or if the pawnor held the chattel merely as a pledge from the true owner, the second pawnee may discharge himself by delivering it to his own pawnor at any time before an offer by the true owner to redeem (*i*).

Although a pledgee may not have a right to pledge to a third person with power of sale, the Court will not interfere to prevent a sale under the second pledge, if the pledgor, having notice of the second transaction, lies by and permits the second pledgee to consider the first pledgee to be the absolute owner, and in consequence to grant time for payment, and to defer the

(*c*) *Johnstone* v. *Stear*, 15 C. B. N. S. 336; *Brierley* v. *Kendall*, 17 Q. B. 937.

(*d*) *Johnstone* v. *Stear*, *sup.*; *Donald* v. *Suckling*, L. R. 1 Q. B. 585; *Halliday* v. *Holgate*, L. R. 3 Ex. 299. See *Chinery* v. *Viall*, 5 H. & N. 288; *Brierley* v. *Kendall*, 17 Q. B. 937; Story on Bailments, s. 315.

(*e*) *Donald* v. *Suckling*, L. R. 1 Q. B. 585.

(*f*) *Vaughan* v. *Watt*, 6 M. & W. 492.

(*g*) Story on Bailments, s. 340.

(*h*) Per Pollock, C.B., in *Cheeseman* v. *Exall*, 6 Exch. 341.

(*i*) *Franklin* v. *Neate*, 13 M. & W. 481.

sale from time to time; more especially if the original pledgor has the benefit of the second advance (*k*).

Sale of pledge.

The proper remedy of a pledgee is sale of the goods; he is not entitled to a decree for foreclosure (*l*).

The pledgee has on default a right to sell the pledge (*m*) if the payment is to be made on a certain day; otherwise not (*n*); but a sale before default would be a conversion (*o*); yet the sale, whether wrongful or not, passes the title to the vendee as against the pledgor (*p*). If no time is fixed for payment, there must be a previous demand (*q*).

The insertion, in a written memorandum accompanying a pledge, of an express power of sale will not convert the pledgee into a mortgagee (*r*).

Notice.

The pledgee must give due notice to the pledgor of his intention to sell (*s*), and if the sale is *bonâ fide* and reasonably made it will be binding (*t*).

It has been stated that a notice demanding an excessive sum is bad (*u*), but, *semble*, a pledgee can sell after reasonable notice requiring payment, even if he makes a mistake as to the amount due to him and demands too much (*x*). A month's notice or even less would seem to be a reasonable notice (*y*).

Pledge and lien distinguished.

The case of pawns differs from that of a lien, which does not carry with it a right of sale (*z*).

If several things are pledged, the whole debt attaches on each, and they may be sold from time to time, and if the whole debt is not satisfied, the pledgor may be sued for the deficiency (*a*). If one thing perishes without any default, the residue is liable to be sold for the whole debt (*b*).

(*k*) *Nicholson* v. *Hooper*, 4 My. & Cr. 179.

(*l*) *Carter* v. *Wake*, 4 Ch. D. 605; *Harrold* v. *Plenty*, (1901) 2 Ch. 314.

(*m*) *Martin* v. *Reid*, 11 C. B. N. S. 730.

(*n*) *Pigot* v. *Cubley*, 10 Jur. N. S. 318. But see *Stubbs* v. *Slater*, *inf.*

(*o*) *Johnstone* v. *Stear*, 15 C. B. N. S. 330.

(*p*) *Donald* v. *Suckling*, L. R. 1 Q. B. 585; *Halliday* v. *Holgate*, L. R. 3 Ex. 299.

(*q*) Story on Bailments, s. 308; *France* v. *Clark*, 22 Ch. D. 830, at p. 833.

(*r*) *Franklin* v. *Neate*, 13 M. & W. 48.

(*s*) Story on Bailments, s. 310; *Kemp* v. *Westbrook*, 1 Ves. Sen. 278.

(*t*) *Pothonier* v. *Dawson*, Holt, N. P. 385; *Tucker* v. *Wilson*, 1 P. Wms. 261; *Lockwood* v. *Ewer*, 2 Atk. 303.

(*u*) *Pigot* v. *Cubley*, 15 C. B. N. S. 701.

(*x*) *Stubbs* v. *Slater*, (1910) 1 Ch. 632.

(*y*) *Deverges* v. *Sandeman & Co.*, (1902) 1 Ch. 579.

(*z*) *Pothonier* v. *Dawson*, *sup.*; *Lickbarrow* v. *Mason*, 2 T. R. 63; *Walter* v. *Smith*, 5 B. & Ald. 439.

(*a*) Story on Bailments, s. 314, ed. 8; *South Sea Co.* v. *Duncomb*, 2 Stra. 919; *Tooke* v. *Hartley*, 2 Bro. C. C. 125.

(*b*) *Ratcliff* v. *Davis*, Cro. Jac.

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The pledgee is not as a general rule compellable to sell, and he may sue the pawnor personally without selling (*c*); the pledgee can never be himself the purchaser (*d*). The pledgor may, in a fit case, compel a sale of the pledge (*e*).

A pledgee of chattels, *e.g.*, railway bonds to bearer, is not entitled to foreclosure, only to a sale (*f*). *Secus*, as to railway shares (*g*) where a transfer had been made (*g*). The pledgee never has the absolute ownership at law, and his equitable rights cannot exceed his legal right (*f*).

A mortgage of shares by deposit of the share certificate, together with a blank transfer, is not a pledge (*h*).

At the common law, the pledgee of goods cannot, before the period for redemption has expired, alienate the property absolutely, nor beyond the title actually possessed by him, unless in special cases (*i*). A pledgee of negotiable instruments, however, can sell at any time so as to confer a good title on a purchaser for value without notice (*k*). But, as between the pledgee and pledgor, it would seem that the pledgee of such instruments has no right, in the absence of a special power, to sell the pledge, but is bound to collect it, and apply the proceeds to his own debt; it is his duty to use all due diligence to collect such notes, and in default of this he will be liable (*l*).

Where goods are pledged and no time for redemption is named, it is said that the pledgor has his whole life to redeem them in, and the Statute of Limitations does not bar the pledgor's right; but if not redeemed during his life, they are irredeemable (*m*); but the better opinion seems to be, that the pawnee has a right upon request to insist upon a prompt fulfilment of the engagement, and if the pawnor neglects or refuses to comply, the pawnee may, upon due demand and notice to the pawnor, require the pawn to be sold (*n*).

244; Bac. Abr. Bailments, B.; *Anon.*, 2 Salk. 522.

(*c*) *South Sea Co.* v. *Duncomb*, 2 Stra. 919; Bac. Abr. Bailments, B.

(*d*) Story on Bailments, s. 319, ed. 8.

(*e*) *Ibid.* s. 320; *Kemp* v. *Westbrook*, 1 Ves. Sen. 278.

(*f*) *Carter* v. *Wake*, 4 Ch. D. 605; *Harrold* v. *Plenty*, (1901) 2 Ch. 314.

(*g*) *General Credit, &c. Co.* v. *Glegg*, 22 Ch. D. 549.

(*h*) *Stubbs* v. *Slater*, *sup.*

(*i*) *Demainbray* v. *Metcalf*, 2 Vern. 691; *Hartopp* v. *Hoare*, 3 Atk. 44; *Pickering* v. *Busk*, 15 East, 38.

(*k*) *Miller* v. *Race*, 1 Burr. 452; *Grant* v. *Vaughan*, 3 Burr. 1516; *Wookey* v. *Pole*, 4 B. & Ald. 1, and cases cited *ante*, p. 1482.

(*l*) Story on Bailments, s. 321.

(*m*) *Ratcliff* v. *Davis*, 1 Bulstr. 29; *Kemp* v. *Westbrook*, 1 Ves. Sen. 278.

(*n*) Story on Bailments, s. 308; *Stubbs* v. *Slater*, (1910) 1 Ch. 632.

The mortgagee or pawnee of chattels, who sells either under a special or implied power, is bound to account for the proceeds, to pay over to the owner the surplus of the purchase-money beyond his demand and the necessary expenses and charges, and to return any unsold part of the security to the mortgagor; if he attempt to dispose of the money so as to prejudice any person entitled to receive it, he may be ordered to pay it into Court, and a receiver may be appointed of the proceeds of any part of the property which may remain unsold (*o*).

Effect of re-delivery.

The re-delivery of the possession of the thing, with the consent of the pledgee, terminates his title (*p*); but if the thing is delivered back to the owner for a temporary purpose, and it is agreed to be re-delivered by him, the pledgee may recover it against the owner if he refuse to return it after the purpose is fulfilled (*q*); but a wrongful possession by the owner does not terminate the pledge (*r*), nor a delivery to the owner as a special bailee or agent (*r*). So, where a pledgee, who had by the contract an absolute right to sell, delivered the goods to the pledgor for purposes of sale, he did not thereby terminate the pledge as against the pledgor and his creditors (*s*).

Possession of pledgor.

The possession of the pledgor himself may be deemed sufficient, if by the contract it be made the possession of the pledgee (*t*), while that of the pledgee will not be affected by reason that the pledgor has the use of the chattel, provided that it remain under the pledgee's control, and that the user be for the purpose of carrying out, or be consistent with, the contract (*u*).

Transferee from pledgor.

Where the pledgee having a special property in the pledge is induced by the fraudulent representation of the pledgor to revest the property in him, a *bonâ fide* transferee from the latter is preferred (*x*). Where one of two innocent parties has enabled the third party to commit the fraud, he must suffer (*x*).

(*o*) *Wilson* v. *Tooker*, 5 Bro. P. C. 193; approved, *Deverges* v. *Sandeman*, (1902) 1 Ch. 579, C. A.

(*p*) *Ryall* v. *Rowles*, 1 Ves. Sen. 349. See *Reeves* v. *Capper*, 5 Bing. N. C. 136.

(*q*) *Roberts* v. *Wyatt*, 2 Taunt. 268.

(*r*) Story on Bailments, s. 299.

(*s*) *North Western Bank* v. *Poynter*, (1895) A. C. 56.

(*t*) *Reeves* v. *Capper*, 5 Bing. N. C. 136; *Martin* v. *Reid*, 11 C. B. N. S. 730; *Meyerstein* v. *Barber*, L. R. 2 C. P. 38, at p. 52, per Willes, J., affd. *sub nom. Barber* v. *Meyerstein*, L. R. 4 H. L. 317.

(*u*) *Crowfoot* v. *London Dock Co.*, 2 Cr. & M. 637.

(*x*) *Babcock* v. *Lawson*, 5 Q. B. D. 284.

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Distress and execution.

In cases of executions against private persons, a creditor of the pawnor cannot take the pledge from the pawnee without first discharging the pawnee's claim, or otherwise extinguishing his title (*y*)

As to the right of distress or execution against the pawn in the hands of the pawnee for his own debt, the pawn is protected in the case of a professional pawnbroker, upon the principle generally applicable to goods intrusted to persons who carry on a public trade, and who manage and deal with goods in the way of their trade (*z*); as well as because the pawnee is bound to restore the pledge upon redemption, which appears to be a sufficient ground for protection in the case of a general pawn. The protection of the pledge from distress is probably of great antiquity (*a*).

As regards pledges generally, a right of lien upon goods is not a subject for seizure by the sheriff, not being saleable (*b*); nor can the sheriff seize goods subject to a lien (*c*).

But a pawnbroker's interest in a redeemable pledge may be seized under a *fi. fa.* (*d*); and, generally, money paid for the redemption of goods in pledge with the execution debtor, or, as it seems, money arising from the sale of pledges after the time for redemption has elapsed, will belong to the execution creditor (*e*).

Section II.

Of Pledges under the Pawnbrokers Act.

Pawnbrokers Act, 1872.

i.—General Effect of the Act.—The expression "pawnbroker" in the Pawnbrokers Act, 1872, is defined (*f*) to include every person who carries on the business of taking goods and chattels in pawn, and accordingly does not apply to loans made by private persons on the security of pledges. The

(*y*) Story on Bailments, s. 353.
(*z*) *Swire* v. *Leach*, 18 C. B. N. S. 479.
(*a*) Manwood, 103, s. 14.
(*b*) *Legg* v. *Evans*, 6 M. & W. 36.
(*c*) *Rogers* v. *Kennay*, 11 Jur. 14.
(*d*) *Re Rollason, Rollason* v. *Rollason*, 34 Ch. D. 495.
(*e*) *Squire* v. *Huetson*, 1 Q. B. 308. See Com. Dig. tit. Execution, c. 4.
(*f*) 35 & 36 Vict. c. 93, s. 5.

expression also includes (*g*) the personal representatives of a deceased pawnbroker, but not so as to impose on them any personal liability under the Act except in respect of their own acts or neglects.

The Money-lenders Act, 1900, s. 6, excludes pawnbrokers from the operation of that Act so long as they only carry on the business of pawnbrokers (*h*).

The Pawnbrokers Act applies to every loan by a pawnbroker of 40*s*. or under, or except as is otherwise provided in relation to cases of special contract under the Act (*i*), to every loan of above 40*s*. and not above 10*l*. (*k*). In advances above 10*l*., a pawnbroker has the same benefit of the abolishment of the laws of usury as any other person (*l*). The Act requires entries to be made, and a pawn-ticket and duplicate to be delivered, but neither the ticket nor the duplicate is subject to stamp duty (*m*). The Act is not applicable where the loan exceeds 10*l*. (*n*), and therefore a person colourably advancing sums each less than 10*l*. with a view of protecting an advance of 200*l*., could not avail himself of that statute (*o*).

Non-compliance with the provisions of the Act.

If the pawnbroker does not comply with the provisions of the Act, he acquires no property in, nor can maintain a lien on, the goods which may be recovered in an action, and the contract is void (*p*). The requisites under the Act are conditions precedent to the legality of the loan, though penalties are attached to the omission of them (*p*). The case of the pawnbroker, where the contract itself is void, is different from that of a loan or mortgage of a ship, without reciting the certificate of registry, and from that of a loan on the security of an ecclesiastical benefice, in which cases the lender may recover on the contract, though the security is void (*q*).

A pawnbroker has no defence against the real owner of a pawned article (*r*), even though he purchases it at a sale by auction (*s*).

(*g*) *Ibid.* s. 7.
(*h*) *Newman* v. *Oughton*, (1911) 1 K. B. 792.
(*i*) 35 & 36 Vict. c. 93, s. 24.
(*k*) *Ibid.* s. 10.
(*l*) *Fitch* v. *Rochfort*, 13 Jur. 351.
(*m*) 35 & 36 Vict. c. 93, s. 24.
(*n*) *Pennell* v. *Attenborough*, 4 Q. B. 868.
(*o*) *Tregonning* v. *Attenborough*, 7 Bing. 97.
(*p*) *Fergusson* v. *Norman*, 5 Bing. N. C. 76. And see *Cope* v. *Rowlands*, 2 M. & W. 149; and *Attenborough* v. *London*, 17 Jur. 416.
(*q*) *Kerrison* v. *Cole*, 8 East, 231; *Mouys* v. *Leake*, 8 T. R. 411.
(*r*) *Tasker* v. *Attenborough*, W. N. (1881) 111.
(*s*) *Burrows* v. *Barnes*, 82 L. T. 721.

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ii.—**Redemption of Pawned Goods.**—With regard to the redemption of goods pledged to pawnbrokers, the Pawnbrokers Act, 1872 (*t*), enacts as follows:—

Holder of pawn-ticket entitled to redeem.

Sect. 25. "The holder for the time being of a pawn-ticket shall be presumed to be the person entitled to redeem the pledge, and, subject to the provisions of this Act, the pawnbroker shall accordingly (on payment of the loan and profit) deliver the pledge to the person producing the pawn-ticket, and he is hereby indemnified for so doing."

Production of pawn-ticket on redemption.

Sect. 26. "A pawnbroker shall not (except as in this Act provided) be bound to deliver back a pledge unless the pawn-ticket for it is delivered to him."

The twenty-fifth section protects the pawnbroker only against the pawnor or the owner who has authorized the pledge, but the statute does not affect the common law right of the owner of property pledged against his will to sue for its return (*u*).

Any person who, not being entitled to redeem, and not having any colour of title by law to redeem, a pledge, attempts or endeavours to redeem the same, is guilty of an offence against this Act (*x*).

Period of redemption.

By sect. 16 of the Act, pledges are redeemable for one year with seven days of grace. By sect. 17, pledges for ten shillings or under not redeemed within that period are forfeited to the pawnbroker; but by sect. 18, pledges for more than ten shillings are redeemable until sale.

Loss of pledge.

Where a pledge is lost by the pawnbroker and the owner seeks to redeem it, the loss constitutes a reasonable cause within sect. 31 for not delivering it (*y*).

Sale of pledges.

iii.—**Sale and Custody of Pawned Goods.**—By sect. 19, pledges for above ten shillings may be sold by the pawnbroker by public auction only, and the pawnbroker may bid at such auction, and thus become the absolute owner of the property. But no property in the pledge purchased passes to the pawnbroker as against the true owner of the pledge (*z*).

(*t*) 35 & 36 Vict. c. 93, ss. 25, 26. See also sect. 29.

(*u*) *Singer Manufacturing Co.* v. *Clark*, 5 Ex. D. 37; *Leicester* v. *Cherryman*, (1907) 2 K. B. 101.

(*x*) 35 & 36 Vict. c. 93, s. 34 (3).

(*y*) *Allworthy* v. *Clayton*, (1907) 2 K. B. 685.

(*z*) *Burrows* v. *Barnes*, 82 L. T. 721.

A special contract pawn-ticket given under sect. 24 does not take away the common law right of the pawnbroker who has sold the goods for less than the amount of the debt to recover the balance from the pledgor (*a*).

Liability of pawnbroker in case of fire.

Sect. 27. "Where a pledge is destroyed or damaged by or in consequence of fire, the pawnbroker shall nevertheless be liable on application, within the period during which the pledge would have been redeemable, to pay the value of the pledge after deducting the amount of the loan and profit, such value to be the amount of the loan and profit and twenty-five per cent. on the amount of the loan. A pawnbroker shall be entitled to insure to the extent of the value so estimated."

Compensation for depreciation of pledge.

Sect. 28. "If a person, entitled and offering to redeem a pledge, shows to the satisfaction of a Court of summary jurisdiction that the pledge has become or has been rendered of less value than it was at the time of the pawning thereof by or through the default, neglect, or wilful misbehaviour of the pawnbroker, the Court may, if it thinks fit, award a reasonable satisfaction to the owner of the pledge in respect of the damage, and the amount awarded shall be deducted from the amount payable to the pawnbroker, or shall be paid by the pawnbroker (as the case requires) in such manner as the Court directs."

Section III.

Pledges of Goods, etc. by Factors—the Factors Act, 1889.

What is a factor.

i. **Definitions of various Expressions for the Purposes of the Act.**—A factor is an agent intrusted with the possession of goods for the purpose of sale; he is not the less a factor because his power contains restrictions; it does not matter whether he sell in his own name or in that of his principal (*b*).

Factors Act, 1889.

The law on this subject has been consolidated and amended by the Factors Act, 1889 (*c*), which repeals all the previous statutes relating to dealings by factors.

Definition of "mercantile agent."

Except as part of the title of this Act, the expression "factor" is not used or defined. The Act substitutes the expression "mercantile agent" for "agent intrusted" used in

(*a*) *Jones* v. *Marshall*, 24 Q. B. D. 269.

(*b*) *Stevens* v. *Biller*, 25 Ch. D. 31, C. A.

(*c*) 52 & 53 Vict. c. 45.

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the former Acts (*d*), and relates only to dealings with mercantile agents, who are thus defined for the purposes of the Act by sect. 1, sub-sect. (1) thereof:—

"The expression 'mercantile agent' shall mean a mercantile agent having in the customary course of his business as such agent authority to sell goods, or to consign goods for the purpose of sale, or to buy goods, or to raise money on the security of goods."

Who is an "agent" for the purposes of the Act.

The definition given by the present Act, no less than those given by former Acts, includes only "agents." The definition, therefore, applies only to persons of the class ordinarily carrying on the business of mercantile agents, and not to mere servants (*e*), nor persons who have possession of goods for purposes of safe custody, carriage, or other special purpose, where the relation of principal and agent does not arise out of the contract, as wharfingers, warehousemen, carriers or other bailees (*f*), nor a mortgagor of stock-in-trade allowed to retain possession thereof for the purpose of carrying on his business (*g*), nor to a buyer intrusted with goods on sale or return, though it is otherwise if the goods are sent to a retail dealer for the purposes of sale or return (*h*).

An isolated employment of a person as agent constitutes him a "mercantile agent" within the Act (*i*).

Other definitions.

Sect. 1 of the Act of 1889 contains also the following definitions for the purposes of the Act:—

"Possession."

"(2.) A person shall be deemed to be in possession of goods or of the documents of title to goods, where the goods or documents are in his actual custody or are held by any other person subject to his control or for him or on his behalf:

"Goods."

"(3.) The expression 'goods' shall include wares and merchandise:

"Document of title."

"(4.) The expression 'document of title' shall include any bill of lading, dock warrant, warehouse-keeper's certificate, and warrant or order for the delivery of goods, and any other document used in the ordinary course of business as proof of the possession or control of goods, or authorizing or purporting to authorize,

(*d*) See *Cole* v. *North Western Bank*, L. R. 10 C. P. at p. 368.

(*e*) *Lamb* v. *Attenborough*, 1 B. & S. 831.

(*f*) *Monk* v. *Whittenbury*, 2 B. & Ad. 484; *Inglis* v. *Robertson*, (1898) A. C. 616.

(*g*) *Joseph* v. *Webb*, 1 C. & E. 262.

(*h*) *Weiner* v. *Harris*, (1910) 1 K. B. 285, overruling *Hastings* v. *Pearson*, (1893) 1 Q. B. 62.

(*i*) *Hayman* v. *Flewker*, 13 C. B. N. S. 519; *Baines* v. *Swainson*, 4 B. & S. 270; *Cole* v. *North Western Bank*, L. R. 10 C. P. 354; *Tremoille* v. *Christie*, 69 L. T. 338.

either by indorsement or by delivery, the possessor of the document to transfer or receive goods thereby represented:

"(5.) The expression 'pledge' shall include any contract pledging, or giving a lien or security on, goods, whether in consideration of an original advance or of any further or continuing advance or of any pecuniary liability: "Pledge."

"(6.) The expression 'person' shall include any body of persons corporate or unincorporate." "Person."

Definitions considered.

Where a factor has pledged goods for a debt which does not exhaust the whole value of the goods, they are still in his control to the extent to which they are not exhausted by that pledge, so as to enable him to pledge them again for the balance (*k*).

The term "goods" in this Act as thereby defined is restricted to goods dealt with in mercantile transactions, and does not include furniture in a private house (*l*).

Stock and shares not being "goods" within the meaning of the Act, stock and share certificates are not documents of title within this definition (*m*).

Independently of the Act, it has been held that delivery orders are (*n*), but that wharfingers' certificates are not (*o*), documents of title to goods, but, having regard to the general words of definition in the present Act, the question whether or not a wharfingers' certificate is within them must depend on the form of the particular certificate in each case.

A valid pledge under this Act may be made either for an actual present advance, or as a security for an antecedent debt, but the rights of the pledgee will be different in the two cases (*p*).

It is to be observed that the definition of "pledge" includes not only pledges in the strict sense of the word, but also securities which, in cases not falling within the Act, would be deemed to be equitable assignments and operate accordingly. As where a factor, having pledged goods by deposit of the bill of lading for less than their full value, subsequently made a

(*k*) *Portalis* v. *Tetley*, L. R. 5 Eq. 140.

(*l*) *Wood* v. *Rowcliffe*, 6 Ha. 183.

(*m*) *Freeman* v. *Appleyard*, 32 L. J. Ex. 175.

(*n*) *Merchant Banking Co.* v. *Phœnix Bessemer Steel Co.*, 5 Ch. D. 205. See *Union Credit Bank* v. *Mersey Docks*, (1899) 2 Q. B. 205; *Inglis* v. *Robertson*, (1898) A. C. 616.

(*o*) *Gunn* v. *Bolckow, Vaughan & Co.*, L. R. 10 Ch. 491.

(*p*) 52 & 53 Vict. c. 45, ss. 2, 4.

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further pledge to another person by an order in writing communicated to and assented to by the first pledgee (*q*).

ii. Statutory Rights, Powers, and Liabilities of "Mercantile Agents."—By sect. 2 of the Act of 1889, it is enacted as follows:—

Powers of mercantile agent with respect to disposition of goods.

Sect. 2.—"(1.) Where a mercantile agent is, with the consent of the owner, in possession of goods or of the documents of title to goods, any sale, pledge, or other disposition of the goods, made by him when acting in the ordinary course of business of a mercantile agent, shall, subject to the provisions of this Act, be as valid as if he were expressly authorized by the owner of the goods to make the same; provided that the person taking under the disposition acts in good faith, and has not at the time of the disposition notice that the person making the disposition has not authority to make the same.

"(2.) Where a mercantile agent has, with the consent of the owner, been in possession of goods or of the documents of title to goods, any sale, pledge, or other disposition, which would have been valid if the consent had continued, shall be valid notwithstanding the determination of the consent; provided that the person taking under the disposition has not at the time thereof notice that the consent has been determined.

"(3.) Where a mercantile agent has obtained possession of any documents of title to goods by reason of his being or having been, with the consent of the owner, in possession of the goods represented thereby, or of any other documents of title to the goods, his possession of the first-mentioned documents shall, for the purposes of this Act, be deemed to be with the consent of the owner.

"(4.) For the purposes of this Act the consent of the owner shall be presumed in the absence of evidence to the contrary."

Extent of authority.

The authority to pledge given by the section is a general authority given to every mercantile agent, and is not restricted by a custom in any particular trade, that a mercantile agent employed to sell goods has no authority to pledge them (*r*).

What amounts to consent of owner.

The consent of the owner under this section means a consent to possession by the agent for any purpose, and a pledgee will obtain the protection of the Act, though the consent was given for a particular purpose and the agent pledges the goods for another purpose, provided that the pledge for such other purpose was made in the ordinary course of business, unless the pledgee knew that the agent had not authority to make the

(*q*) *Portalis* v. *Tetley*, L. R. 5 Eq. 140.

(*r*) *Oppenheimer* v. *Attenborough*, (1908) 1 K. B. 221.

contract, or that he was acting *malâ fide* (*s*). If the symbol of property is intrusted to the factor, the owner has no relief against a *bonâ fide* purchaser or mortgagee (*t*). To deprive the pledgee of the benefit of the Act there must be *mala fides*, or notice of want of authority in the factor, and the question of *mala fides* is for the jury (*u*).

Where one of joint pledgees does not act in good faith the others will not be protected by sect. 2 (1), and it seems that possession of goods obtained by larceny by a trick is not possession with the consent of the owner within the sub-section (*x*).

Pledge must be in ordinary course of business.

The pledge must be made by a mercantile agent when acting in the ordinary course of business as such. Under an old statute it was held that a wharfinger, who received flour in that capacity, though he was in the habit of doing business as a flour factor, was not within the Act (*y*).

Provided this condition is fulfilled, a valid pledge may be given to secure an advance made where there was only a possible liability, which had not then resulted, and might never result in a debt (*z*), or if an advance is made to meet a possible liability of the broker, as where he has bought goods for, and may be liable to pay for them as surety in default of, the factor (*a*).

But the protection of the Act does not extend to a pledge given to cover the general balance due by the factor to a broker or to a carrier or warehouseman (*b*), nor to the case of an undisclosed foreign principal claiming the goods unsold in the hands of the broker (*c*), or the insurance moneys which represent the goods insured for the benefit of all parties whom it might concern (*d*).

But where the goods have been sold, the balance of the

(*s*) *Kingsford* v. *Merry*, 1 H. & N. 503; *Higgons* v. *Barton*, 26 L. J. Ex. 342; *Sheppard* v. *Union Bank of London*, 7 H. & N. 661; *Baines* v. *Swainson*, 4 B. & S. 270.

(*t*) *Vickers* v. *Hertz*, L. R. 2 H. L. Sc. 113.

(*u*) *Gobind* v. *The Administrator-General of Bengal*, 15 Moo. P. C. 230; *Douglas* v. *Ewing*, 6 Ir. Com. L. R. 395.

(*x*) *Oppenheimer* v. *Frazer*, (1907) 2 K. B. 50.

(*y*) *Monk* v. *Whittlebury*, 2 B. & Ad. 484; *Inglis* v. *Robertson*, (1898) A. C. 616. See *Cole* v. *North Western Bank*, L. R. 10 C. P. 354; *Biggs* v. *Evans*, (1894) 1 Q. B. 88.

(*z*) *Jewan* v. *Whitworth*, L. R. 2 Eq. 692.

(*a*) *Kaltenbach* v. *Lewis*, 24 Ch. D. 54, C. A.

(*b*) *Leuchart* v. *Cooper*, 3 Bing. N. C. 99.

(*c*) *Kaltenbach* v. *Lewis*, *sup.* at pp. 81, 82.

(*d*) *Mildred* v. *Maspons*, 8 App. Ca. 874.

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proceeds in the hands of the broker cannot be recovered by the undisclosed foreign principal, as there is no privity between them (*e*), and such foreign principal can only claim as standing in the place of his agent, and so will be subject to a set-off of the general balance due by the agent to the broker (*e*).

Where goods are consigned for sale on account of the consignor, a *bonâ fide* pledge by the consignee is within the Act (*f*), though the pledgee had notice that the consignment was *for sale:* to avoid such a pledge there must be knowledge that the agent was prohibited from pledging (*g*).

Notice that pledge is *ultra vires.*

In order to obtain the protection of the Act, the pledgee must take the security in good faith, and must not have notice that the giving of the security was in excess of the authority of the pledgor as agent. The notice need not be by direct communication, but may be by any circumstances which would induce a reasonable man to infer that the pledge was improper (*h*). The House of Lords in one case declined to lay down the rule that knowledge, however acquired, of want of authority would necessarily be equivalent to notice, so as to deprive a pledgee of his lien (*i*). It would seem, however, that their lordships meant by knowledge, information which turns out to be correct.

In another case (*k*) it was said that the equitable doctrine of constructive notice will not be strictly applied to honest mercantile transactions.

Where a factor, to whom goods had been consigned by the plaintiff, obtained from the defendant, with whom he was jointly liable on a bill of exchange, a sum of 300*l.* on the security of the goods, for the purpose of taking up the bill, the Court held that the transaction did not come within the protection of the Act (*l*).

The delay of the owner in giving notice to the pledgee that the goods were his did not give the pledgee any greater right than the statute gave him, unless the pledgee's position was thereby altered (*m*).

(*e*) *New Zealand, &c. Land Co.* v. *Watson,* 7 Q. B. D. 374, C. A.

(*f*) *Navulshaw* v. *Brownrigg,* 2 De G. M. & G. 441.

(*g*) *Ibid.*

(*h*) *Evans* v. *Truman,* 2 B. & Ad. 886.

(*i*) *Mildred* v. *Maspons,* 8 App. Ca. 874.

(*k*) *Kaltenbach* v. *Lewis,* 24 Ch. D. 54, at p. 78, C. A. See also *Manchester Trust* v. *Furness,* (1895) 2 Q. B. 539, at p. 545, C. A.

(*l*) *Learoyd* v. *Robinson,* 12 M. & W. 745.

(*m*) *Robertson* v. *Kensington,* 5 Man. & Ry. 381.

The factor may now pledge the goods or documents of title with which he is intrusted for advances to himself, or to a third person on his account (*n*).

Where the factor has pledged the goods of the owner, together with securities of his own, for his own debt, the owner is entitled to have the securities marshalled for his benefit (*o*).

By sect. 3 it is enacted that—

Pledge of documents of title.

"A pledge of the documents of title to goods shall be deemed to be a pledge of the goods."

The term documents of title, as defined for the purposes of the Act, has been already considered (*p*). The section only applies to "mercantile agents" within the meaning of the Act (*q*).

Pledges to secure antecedent debts are regulated by sect. 4 of the Act, which enacts as follows:—

Pledge for antecedent debt.

"Where a mercantile agent pledges goods as security for a debt or liability due from the pledgor to the pledgee before the time of the pledge, the pledgee shall acquire no further right to the goods than could have been enforced by the pledgor at the time of the pledge."

An acceptance not due is an antecedent debt (*r*); so also is a loss on a resale (*s*).

A pledge for an antecedent debt will thus transfer to the pledgee such rights, but no more, as were enforceable by the pledgor against the principal; such are an agent's lien on goods consigned to him for acceptances in respect of bills drawn on him by his principal against the goods (*t*), or advances to his principal on the credit of the goods (*u*); also the lien of an agent for the amount for which he is liable as surety for his principal (*x*). In such cases, however, the pledgee runs the

(*n*) *Sheppard* v. *Union Bank of London*, 7 H. & N. 661; 8 Jur. N. S. 265.

(*o*) *Exp. Alston, Re Holland*, L. R. 4 Ch. 168; *Exp. Salting, Re Stratton*, 25 Ch. D. 148, C. A.

(*p*) *Sup.* p. 1494.

(*q*) *Inglis* v. *Robertson*, (1898) A. C. 616.

(*r*) *Macnee* v. *Gorst*, L. R. 4 Eq. 315; *Learoyd* v. *Robinson*, 12 M. & W. 745.

(*s*) *Macnee* v. *Gorst, sup.*

(*t*) *Hammonds* v. *Barclay*, 2 East, 227.

(*u*) *Pulteney* v. *Keymer*, 3 Esp. 182.

(*x*) *Drinkwater* v. *Goodwin*, 1 Cowp. 251.

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risk of loss of the lien by reason of the discharge behind his back of the principal's obligations (*y*).

Moreover, a factor has a lien on goods consigned for sale and the proceeds thereof for his general balance on the goods (*z*), or on a current account between him and his principal (*a*), and has a specific lien on goods bought for the purchase-money (*b*), and for freight paid in respect thereof (*c*). Any such lien will pass to the pledgee under this section. The lien of a factor for his general balance only attaches on goods which come into his hands as factor (*d*).

An agent who is intrusted with goods for the purposes of sale, does not lose his character of factor, or the right of lien attached to it, by reason of his acting under special instructions as to the mode of sale (*e*).

Sect. 5 enacts as follows:—

Rights acquired by exchange of goods or documents.

"The consideration necessary for the validity of a sale, pledge, or other disposition, of goods, in pursuance of this Act, may be either a payment in cash, or the delivery or transfer of other goods, or of a document of title to goods, or of a negotiable security, or any other valuable consideration; but where goods are pledged by a mercantile agent in consideration of the delivery or transfer of other goods, or of a document of title to goods, or of a negotiable security, the pledgee shall acquire no right or interest in the goods so pledged in excess of the value of the goods, documents, or security when so delivered or transferred in exchange."

This section in effect re-enacts sect. 2 of the Factors Act, 1842. As to exchanges of goods and documents of title as consideration for a pledge, see *Sheppard* v. *Union Bank of London* (*f*).

Agreements through clerks, &c.

Sect. 6. "For the purposes of this Act an agreement made with a mercantile agent through a clerk or other person authorized in the ordinary course of business to make contracts of sale or pledge on his behalf shall be deemed to be an agreement with the agent."

(*y*) *Fletcher* v. *Heath*, 7 B. & Cr. 517.

(*z*) *Godin* v. *Lond. Ass. Co.*, 1 Burr. 490; *Baring* v. *Currie*, 2 B. & Ald. 137; *Drinkwater* v. *Goodwin*, Cowp. 251; *Kinlock* v. *Craig*, 3 T. R. 119, 783; 4 Bro. P. C. 47; *Hammonds* v. *Barclay*, 2 East, 227. See *Turner* v. *Thomas*, L. R. 6 C. P. 613.

(*a*) *Kruger* v. *Willcox*, Amb. 254; *Paul* v. *Birch*, 2 Atk. 622.

(*b*) *Exp. Emery*, 2 Ves. Sen. 674.

(*c*) *Exp. Good*, 3 M. & A. 246.

(*d*) *Dixon* v. *Stansfield*, 10 C. B. 398.

(*e*) *Stevens* v. *Biller*, 25 Ch. D. 31, C. A.

(*f*) 7 H. & N. 661.

Section 7 of the Act gives a lien to consignees of goods in cases where the consignor is merely the bailee of the owner and not a mercantile agent.

Consignors and consignees.

Sections 8 and 9 relate to dispositions by sellers and buyers of goods generally, and are not confined to dealings by mercantile agents within the meaning of the Factors Act (*g*). These enactments have not been repealed, but they have been incorporated in almost identical terms in the Sale of Goods Act, 1893 (*h*), and have already been considered (*i*).

Sellers and buyers of goods.

By sect. 10 of the Act of 1889 it is enacted as follows:—

Effect of transfer of documents on vendor's lien or right of stoppage *in transitu*.

"Where a document of title to goods has been lawfully transferred to a person as a buyer or owner of the goods, and that person transfers the document to a person who takes the document in good faith and for valuable consideration, the last-mentioned transfer shall have the same effect for defeating any vendor's lien or right of stoppage *in transitu* as the transfer of a bill of lading has for defeating the right of stoppage *in transitu*."

The expressions "any vendor's lien" and "right of stoppage *in transitu*" do not mean the same thing; the former signifies the right of an unpaid vendor to retain the goods if they are still in his custody; the latter means the right to retake the goods if they have left his custody. The seller's lien attaches when the buyer is in default, whether he be solvent or insolvent. The right of stoppage *in transitu* only arises when the buyer is insolvent, and does not moreover arise until the seller's lien is gone, for it pre-supposes that the seller has parted with the possession as well as the property in the goods (*k*).

An indorsement of a bill of lading by way of pledge is only an indorsement and transfer for a particular and limited purpose, and the right of stoppage *in transitu* will not be absolutely defeated, but will remain in force subject to a charge in favour of the indorsee of the bill of lading, and on the charge being satisfied the right of stoppage *in transitu* will again become absolute (*l*).

(*g*) Per Bruce, J., in *Shenstone & Co.* v. *Hilton*, (1894) 2 Q. B. 452, at p. 456.
(*h*) 56 & 57 Vict. c. 71, ss. 25, 47.
(*i*) See *ante*, p. 1479.
(*k*) See Chalmers' Sale of Goods Act (5th ed.), p. 80. See, as to "Stoppage *in Transitu*," *Lickbarrow* v. *Mason*, 1 Sm. L. C. (10th ed.) 674, and notes thereto.
(*l*) *Kemp* v. *Falk*, 7 App. Ca. 577.

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The law relating to stoppage *in transitu* has been to a great extent codified by the Sale of Goods Act, 1893 (*m*).

The Factors Act, 1889, contains the following supplemental provisions:—

Mode of transferring documents.

Sect. 11. "For the purposes of this Act, the transfer of a document may be by indorsement, or, where the document is by custom or by its express terms transferable by delivery, or makes the goods deliverable to the bearer, then by delivery."

Saving for rights of true owner.

Sect. 12.—"(1.) Nothing in this Act shall authorize an agent to exceed or depart from his authority as between himself and his principal, or exempt him from any liability, civil or criminal, for so doing.

"(2.) Nothing in this Act shall prevent the owner of goods from recovering the goods from an agent or his trustee in bankruptcy at any time before the sale or pledge thereof, or shall prevent the owner of goods pledged by an agent from having the right to redeem the goods at any time before the sale thereof, on satisfying the claim for which the goods were pledged, and paying to the agent, if by him required, any money in respect of which the agent would, by law, be entitled to retain the goods or the documents of title thereto, or any of them, by way of lien as against the owner, or from recovering from any person with whom the goods have been pledged any balance of money remaining in his hands as the produce of the sale of the goods after deducting the amount of his lien.

"(3.) Nothing in this Act shall prevent the owner of goods sold by an agent from recovering from the buyer the price agreed to be paid for the same, or any part of that price, subject to any right of set off on the part of the buyer against the agent."

Saving for common law powers of agent.

Sect. 13. "The provisions of this Act shall be construed in amplification and not in derogation of the powers exerciseable by an agent independently of this Act."

Proof in bankruptcy.

On the bankruptcy of an agent intrusted with goods the owner might, before the passing of the Act of 1889, have proved for the amount paid by him to redeem, as for money paid for the use of such agent before his bankruptcy, or for the value of the goods if the same were unredeemed (*n*).

Authority of factor independently of statute.

iii.—Powers, &c. of Factors independently of Statute.—From the mere relation of principal and factor, and independently of the above Acts, the factor derives authority to sell at such times and at such prices as he may, in the exercise of his discretion, think best for his employer; but if he receives

(*m*) 56 & 57 Vict. c. 71, ss. 38, 39, 44—48.

(*n*) 5 & 6 Vict. c. 39, s. 7.

the goods subject to any special instructions, he is bound by them, and the authority, whether general or special, is revocable. When, indeed, the factor has advanced money on the goods consigned to him for sale, the authority to sell is, it seems, irrevocable, because coupled with an interest; but still, in that case, on failure of the principal to repay such advances within a reasonable time after demand, the factor cannot sell at any time he pleases, without regard to the interest of the principal and the nature of the authority originally given (*o*). And he cannot sell the goods, though in the exercise of a sound discretion, contrary to the principal's orders, for the purpose of reimbursing himself for advances made to the principal, independently of and after the consignment. There is not in such a case an irrevocable authority coupled with an interest, inasmuch as such an authority only exists where the authority is given for the purpose of being a part of the security, although such subsequent advances might be a good consideration for an agreement that the original revocable authority to sell should become irrevocable (*p*). And accordingly an authority given to the factor, in consideration of former advances, to sell at the best market price, and repay himself (the former authority having a limit as to price), was held to be revocable (*q*).

The authority of the factor may be revoked notwithstanding advances by the factor, unless such advances are accompanied by and made the consideration for an agreement that the authority shall not be revocable (*r*). Where the authority to the factor was revoked, the earlier Acts did not apply (*s*); but now the revocation of the authority does not prejudice the rights of *bonâ fide* purchasers without notice (*t*).

A purchaser from a factor, not knowing that the latter is selling as agent, may, in an action for the price by the real owner, set off a debt due to him by the factor (*u*), although the factor is acting contrary to his instructions (*x*); and an alle-

(*o*) *Smart* v. *Sandars*, 3 C. B. 380.
(*p*) *Ibid.*
(*q*) *Raleigh* v. *Atkinson*, 6 M. & W. 670.
(*r*) *De Comas* v. *Prost*, 3 Moo. P. C. N. S. 158.
(*s*) *Fuentes* v. *Montis*, L. R. 4 C. P. 93.
(*t*) 52 & 53 Vict. c. 45, s. 2, subs. (2), *ante*, p. 1496, re-enacting 40 & 41 Vict. c. 39, s. 2.
(*u*) *Semenza* v. *Brinsley*, 18 C. B. N. S. 472; *Dunn* v. *Norwood*, 14 C. B. N. S. 574.
(*x*) *Exp. Dixon*, 4 Ch. D. 133, C. A.

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gation that the purchaser had the means of knowledge is not sufficient (*y*); but where the purchaser knows the factor to have a principal, he cannot set off the debt due to him by the factor, whether the undisclosed principal carries on business in England or not (*z*), or abroad (*a*).

This set-off is not allowed in an action for damages for not accepting the goods (*b*); nor where the factor has become bankrupt and it was proposed to set off mutual credits (*c*), unless the claim by the bankrupt's trustee was liquidated (*d*).

Instruments and securities, which form part of the currency of this country, such as bills of exchange, exchequer bills, &c., being negotiable, can, of course, be effectually pledged by an agent intrusted with them, or by any other person in whose hands they may be, in fraud of the true owner (*e*), and the same will apply to exchequer bills payable to bearer (*f*); or bonds payable to bearer (*g*).

The principal is protected against the sale, negotiation, transfer or pledge by a broker or other agent of such instrument, in violation of good faith, and contrary to the object for which the same was intrusted to him (*h*).

In the case of foreign securities it rests with the defendant to prove by evidence that they are negotiable by the course of trade here, or by the custom of the country whence they come (*i*). And the Court cannot take cognizance of their character when brought before them for the first time (*k*).

(*y*) *Borries* v. *Imperial Ottoman Bank*, L. R. 9 C. P. 38.

(*z*) *Fish* v. *Kempton*, 7 C. B. 687; *Exp. Dixon*, *sup.*

(*a*) *Lanyon* v. *Blanchard*, 2 Camp. 596.

(*b*) *Turner* v. *Thomas*, 6 East, 610.

(*c*) *Ibid.*

(*d*) *Thornton* v. *Maynard*, 10 East, 700.

(*e*) *Treuttel* v. *Barandon*, 8 Taunt. 100; *Lloyd* v. *Sigourney*, 5 Bing. 525; *Goodman* v. *Harvey*, 4 A. & E. 870.

(*f*) *Wookey* v. *Pole*, 4 B. & Ald. 1; *Brandao* v. *Barnett*, 2 Sc. N. R. 96, 112.

(*g*) *Gorgier* v. *Mieville*, 3 B. & Cr. 45.

(*h*) 24 & 25 Vict. c. 96, ss. 75, 76. And see *Reg.* v. *Tatlock*, 2 Q. B. D. 157.

(*i*) *Lang* v. *Smyth*, 7 Bing. 284; *Glyn* v. *Baker*, 13 East, 509; *Gorgier* v. *Mieville*, 3 B. & Cr. 45.

(*k*) *Lang* v. *Smyth*, *sup.*

CHAPTER LXIV.

HYPOTHECATION BY WAY OF EQUITABLE ASSIGNMENT.

Definition of equitable assignment.

i.—Nature and Operation of Equitable Assignments of Debts or Funds.—An equitable assignment may be defined as an appropriation, for the payment of a debt, of a chose in action or fund of the debtor in the hands of a third person, and may be effected either by agreement between the creditor and the debtor that the debt shall be paid out of specific property belonging to the debtor but not in his possession (*a*), or by an order upon the holder of the specific property to pay the creditor out of such property (*b*).

Notice not necessary to validity of assignment as between assignor and assignee;

With regard to the first class of cases, where an equitable assignment of a debt or fund is made by direct agreement between the creditor and his debtor, it is not essential to the validity of such assignment, as between assignor and assignee, that notice should be given to the party by whom the fund is held; and it is immaterial, in this respect, whether the assignment be for valuable consideration (*c*) or not (*d*). But in determining whether a transaction is an equitable assignment, the fact that no notice was given to the debtor or holder of the fund may be evidence that it was not intended to assign the debt or fund (*e*).

nor as between persons claiming under assignor and assignee.

Nor is notice necessary as between persons claiming under the assignor, such as a person claiming under a subsequent assignment made otherwise than for a valuable consideration (*f*), a creditor who has obtained a garnishee order (*g*), or a judgment

(*a*) *Rodick* v. *Gandell*, 1 De G. M. & G. 763, 776.

(*b*) *Burn* v. *Carvalho*, 4 My. & Cr. 690, at p. 702, and other cases cited *inf.*

(*c*) *Burn* v. *Carvalho*, *sup.*; *Rodick* v. *Gandell*, *sup.*; *Gorringe* v. *Irwell*, *&c. Works*, 34 Ch. D. 128, C. A.

(*d*) *Donaldson* v. *Donaldson*, Kay, 711; *Roberts* v. *Lloyd*, 2 Beav. 376; *Re Way's Trusts*, 2 De G. J. & S. 365; *Re Patrick*, *Bills* v. *Tatham*, (1891) 1 Ch. 82, C. A.

(*e*) *Re Sheward*, (1893) 3 Ch. 502, 509.

(*f*) *Justice* v. *Wynne*, 12 Ir. Ch. R. 289.

(*g*) *Robinson* v. *Nesbitt*, L. R. 3 C. P. 264. See (1903) 2 Ch. at p. 732.

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creditor who has got a receiver appointed (*h*), or who has obtained a charging order (*i*) of the one part, and a creditor assignee of the other part.

Notice necessary to bind holder of fund.

It is, however, necessary for the safety of the assignee that he should give notice of an equitable assignment to the holder of the fund (*k*) so as to bind him and prevent him from paying it over to the assignor, or to other persons claiming under him by a title which, though subsequent in date, may, if acquired for value, enable such persons to acquire precedence by priority of notice; and also in order to prevent the risk of the fund being claimed by the assignor's trustee in bankruptcy.

Assignee bound by equities.

It is well settled that an equitable assignee, who has not given notice, will be bound by any equities between the assignor and the holder of the fund, so as to be obliged to allow any payments made by the holder of the fund to the assignor subsequently to the assignment (*l*).

Holder after notice must pay fund to assignee.

A debtor, trustee, or other holder of a fund who has received notice of an equitable assignment cannot refuse to pay the money to an assignee (*m*); and indemnity cannot be demanded by the debtor or fund holder before payment (*n*). The contingency of the debt does not vary the principle (*o*); nor can a subsequent compromise by the assignor alter the right (*n*).

In the absence of and until notice, the fund holder would be justified and safe in paying away the fund to the assignor or persons claiming under him who appear to be the true owners thereof (*p*).

Holder of fund abroad.

The assignment is valid although the order was addressed by the firm to whom the goods belonged to a partner of the firm who was abroad (*q*). But the holder of a fund, even though he has received notice of its assignment, is not bound to pay it over to the assignee, if the assignee's title is not complete by the law of the *locus rei sitæ* (*r*).

(*h*) *Arden* v. *Arden*, 29 Ch. D. 703. See *Re Anglesey*, (1903) 2 Ch. 727.

(*i*) *Beavan* v. *Lord Oxford*, 6 De G. M. & G. 492; *Kinderley* v. *Jervis*, 22 Beav. 1; *Eyre* v. *M'Dowell*, 9 H. L. C. 619, 742; *Scott* v. *Lord Hastings*, 4 K. & J. 633.

(*k*) *Re King*, *Sewill* v. *King*, 14 Ch. D. 179.

(*l*) *Norrish* v. *Marshall*, 5 Madd. 475; *ante*, p. 1281.

(*m*) *Jones* v. *Farrell*, 1 De G. & J. 208; *Hutchinson* v. *Heyworth*, 9 A. & E. 375. See *Western Wagon Co.* v. *West*, (1892) 1 Ch. 271; and cf. *Bence* v. *Shearman*, (1898) 2 Ch. 582.

(*n*) *Jones* v. *Farrell*, *sup.*

(*o*) *Rodick* v. *Gandell*, 1 De G. M. & G. 763.

(*p*) *Ward* v. *Duncombe*, (1893) A. C. 369, 392.

(*q*) *Rayner* v. *Harford*, 4 Jur. N. S. 703.

(*r*) *Sichel* v. *Raphael*, 10 Jur. N. S. 1165. But see *Exp. Holthausen*, L. R. 9 Ch. 722.

Another risk to which an equitable assignee subjects himself by omitting to give notice to the holder of the fund is that some subsequent assignee for value, not having notice of the previous assignment, may, by giving notice of the assignment to him, acquire priority over the original assignee (*s*).

Priority by notice.

An agreement by a debtor with his creditor for payment of his debt out of funds in the hands of a third person, if communicated to such third person, will prevail against a subsequent bankruptcy though intervening while the letter or memorandum containing notice of the agreement is being duly forwarded, and on its way to the holder of the fund (*t*). So also an order on the fund holder to pay the creditor out of the fund, being *ipso facto* notice of the equitable assignment, will oust the claim of the debtor's trustee in bankruptcy (*u*).

Assignment after notice prevails over assignor's trustee in bankruptcy.

The extinguishment of the original debt due from the assignor to the assignee seems to have been in an earlier case considered necessary at law as a consideration to support the agreement (*x*). But in *Walker* v. *Rostron* (*y*), where the order was by way of additional security, it was held that no further consideration was necessary beyond the existence of the debt due from the assignor to the assignee, as in the case of any other collateral security.

Extinguishment of debt not necessary.

The assignee of a debt could not before the Judicature Act, 1873, have sued for it in equity, unless the assignor had refused to allow him to use his name, or did or intended to do some act to prevent the assignee from recovering it at law (*z*). This Act empowers an assignee to sue in his own name in cases of "absolute assignment not purporting to be by way of charge only"; but though a conveyance by way of mortgage has been held to be within this enactment, a distinction has been drawn between such an instrument and one which only gives a right to payment out of a particular fund or particular property without transferring that fund or property (*a*). It is plain

Action by assignee.

(*s*) *Dearle* v. *Hall*, 3 Russ. 1; *Marchant* v. *Morton*, (1901) 2 K. B. 829. The risks attending the omission to give notice of an equitable assignment of a debt or fund are more fully considered, with reference to mortgages, *ante*, pp. 318 *et seq.*

(*t*) *Row* v. *Dawson*, 1 Ves. Sen. 331; *Exp. South, Re Row*, 3 Swanst. 392; *Collyer* v. *Fallon*, T. & R. 459; *Burn* v. *Carvalho*, 4 My. & Cr. 690; *ante*, p. 1282.

(*u*) *Miln* v. *Walton*, 2 Y. & C. C. C. 354. See *Re Wallis*, (1902) 1 K. B. 719.

(*x*) *Wharton* v. *Walker*, 4 B. & Cr. 163.

(*y*) 9 M. & W. 411.

(*z*) *Hammond* v. *Messinger*, 9 Sim. 327.

(*a*) *Tancred* v. *Delagoa Bay Co.*, 23 Q. B. D. 239.

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that every equitable assignment is not within the enactment (*b*), and that those purporting to be by way of charge only are not within it (*c*). It seems clear, therefore, that hypothecations operating by way of equitable assignment and which are by way of security only are still governed by the law independent of the statute, and that the assignee cannot generally sue in his own name without a power of attorney enabling him to do so (*d*).

Delay in enforcing security.

The equitable assignee of a debt is not subject to the same rules as the holder of a bill of exchange as to the obligation to use due diligence. And accordingly where a partner gave a promissory note to secure an advance, and also, by way of collateral security, an equitable assignment of his share in the partnership, but did not enforce his security till after the firm had become insolvent, it was held that the assignee was not barred from relief by the delay, and that, as he could not have obtained payment of the money, he could not be charged with it (*e*).

Assent of holder not necessary to validity of assignment.

The assent of the fund holder to an order or appropriation of the fund is not necessary to bind him and to enable the creditor to sue; the mere communication to the holder of the order or appropriation is sufficient to amount to an equitable assignment binding on him without any assent on his part (*f*).

Equitable assignment by informal words.

ii.—What will amount to an Equitable Assignment of a Debt or Fund.—When the agreement or order is in writing, no particular form of words is necessary to effect an equitable assignment (*g*), and to give a good charge on the chose in action (*h*), unless the agreement is within the Statute of Frauds (*i*). Any words, however informal, are sufficient for that purpose, provided the intention clearly appear thereby that a specific fund shall be appropriated for payment of the debt (*k*), and that payment out of the fund so appropriated

(*b*) *Durham* v. *Robertson*, (1898) 1 Q. B. 765; *Hughes* v. *Pump House Hotel Co.*, (1902) 2 K. B. 190.

(*c*) *Jones* v. *Humphreys*, (1902) 1 K. B. 10.

(*d*) See further, on this question, *ante*, pp. 321 *et seq.*

(*e*) *Glyn* v. *Hood*, 1 De G. F. & J. 334.

(*f*) *Lett* v. *Morris*, 4 Sim. 607.

(*g*) *Row* v. *Dawson*, 1 Ves. Sen. 331.

(*h*) *Gorringe* v. *Irwell*, 34 Ch. D. 134.

(*i*) *Exp. Hall*, 10 Ch. D. 615.

(*k*) *Thomson* v. *Simpson*, L. R. 5 Ch. 659; *Citizens' Bank of Louisiana* v. *First National Bank of Orleans*, L. R. 6 H. L. 352; *Exp. Irving, Re Pratt*, 7 Ch. D. 419; *Percival* v. *Dunn*, 29 Ch. D. 128; *Tailby* v. *Official Receiver*, 13 App. Ca. 543.

shall be made to the person claiming under the assignment (*l*). The language is immaterial if the meaning is plain (*m*).

An informal letter may operate as an effectual equitable assignment, though it expresses an intention subsequently to execute a formal deed of assignment (*n*).

Instances of what will be sufficient to create an equitable assignment.

Thus, an order on an insurance company in this form, "Take notice that I wish to transfer my interest in the policies to C. D.," is sufficient (*o*). So where a debtor had given a security upon a fund to a creditor, and was also indebted to a third person, an order in writing given by the debtor to such third person, directing the secured creditor to hold the fund (subject to his charge) to the credit of such third person, followed by an agreement by the secured creditor so to hold it, amounts to an equitable charge (*p*).

A direction to an executor to pay a share under a will, if acted on, is sufficient (*q*); and also an order on the executor of a debtor to pay, followed by a promise to pay when there should be funds for the purpose (*r*). So also an order given by a debtor to his solicitor to collect his debt and pay it to a third party is a good equitable assignment (*s*).

Terms must be unequivocal.

The engagement to pay out of the fund must, however, be unequivocal. Therefore the assignment of the benefit of a contract to make a loan is not a good equitable assignment (*t*). A promise to pay when the debtor receives a sum due to him from a third person, without any agreement that the creditor shall receive that sum or be paid specifically out of that sum, is not sufficient (*u*); nor a mere representation that there were funds at a particular bank to meet a bill of exchange drawn upon it (*x*); nor the statement by the debtor that the arrival of a certain cargo would put him in funds (*y*); nor a direction in a bill of exchange to place it against a particular

(*l*) *Bell* v. *London and North Western Rail. Co.*, 15 Beav. 548.

(*m*) *Brandts* v. *Dunlop*, (1905) A. C. 454.

(*n*) *Re King, Sewell* v. *King*, 14 Ch. D. 179.

(*o*) *Chowne* v. *Baylis*, 31 Beav. 351; and see *Ranken* v. *Alfaro*, 5 Ch. D. 790, C. A.

(*p*) *Myers* v. *United Guarantee, &c. Co.*, 7 De G. M. & G. 112.

(*q*) *Lambe* v. *Orton*, 29 L. J. Ch. 319.

(*r*) *Exp. Alderson*, 1 Madd. 53; aff. *Exp. South*, 3 Swanst. 392.

(*s*) *Palmer* v. *Culverwell*, 85 L. T. 758.

(*t*) *Western Wagon Co.* v. *West*, (1892) 1 Ch. 271.

(*u*) *Field* v. *Megaw*, L. R. 4 C. P. 660; *Percival* v. *Dunn*, 29 Ch. D. 128; *West* v. *Newing*, 82 L. T. 260.

(*x*) *Thomson* v. *Simpson*, L. R. 5 Ch. 652. And see *Citizens' Bank, &c.* v. *First National Bank of New Orleans*, L. R. 6 H. L. 352.

(*y*) *Jones* v. *Starkey*, 16 Jur. 510.

cargo (*z*); nor a request to the holder of a fund to hold it at the disposal of the creditor (*a*). A cheque is not an equitable assignment of the drawer's balance at his banker's (*b*), though a valid assignment may be made of a present or future balance at a bank (*c*); nor is a bill of exchange an equitable assignment, though drawn for the exact amount owing (*d*), an assignment being subject to equities which a bill is not (*e*). Nor will a letter advising a creditor that, by instructions of the debtor, a special credit has been opened in his favour with the writer of the letter constitute an equitable assignment or specific appropriation of that sum, as of a fund in the hands of such third person; it is a mere statement by the writer that he will act as paymaster to a particular person up to a certain amount (*f*).

Parol assignment.

A valid equitable assignment may be made even by parol, if the intention to appropriate a specific sum for payment is clearly proved. "If A. tells B. that he expects that 10,000*l.* are coming to him on a given day, and agrees out of that to pay B. 5,000*l.*, that is a good agreement to constitute a charge upon the fund" (*g*).

An order by a creditor to his debtor to pay a sum of money to a third person is not an equitable assignment, unless it amounts to an order or engagement to pay the sum out of a particular fund or debt (*h*). So, an order not acted upon during the debtor's life to transfer into the name of the creditor shares in a company held by the debtor without further evidence of the contract, will not be sufficient to create a lien as against the debtor's other creditors after his death (*i*).

Appropriated fund or debt of unascertained amount.

It is not necessary that the fund, to be capable of being appropriated for payment of a particular debt, should be definitely ascertained as to amount (*k*). A valid equitable

(*z*) *Robey & Co.'s Ironworks* v. *Ollier*, L. R. 7 Ch. 695.

(*a*) *Gorringe* v. *Irwell India Rubber Works*, 34 Ch. D. 128, C. A.

(*b*) *Hopkinson* v. *Forster*, L. R. 19 Eq. 74, Jessel, M.R.

(*c*) *Walker* v. *Bradford Old Bank*, 12 Q. B. D. 511.

(*d*) *Shand* v. *Du Buisson*, L. R. 18 Eq. 283.

(*e*) 29 Ch. D. at p. 875.

(*f*) *Morgan* v. *Le Rivier*, L. R. 7 H. L. 423.

(*g*) Per Page-Wood, V.-C., in *Riccard* v. *Prichard*, 1 K. & J. 277, at p. 279. See also *Tibbits* v. *George*, 5 A. & E. 107; *Gurnell* v. *Gardner*, 4 Giff. 626; *Parish* v. *Poole*, 53 L. T. 35.

(*h*) *Watson* v. *Duke of Wellington*, 1 R. & My. 602, 605; *Percival* v. *Dunn*, 29 Ch. D. 128.

(*i*) *Cumming* v. *Prescott*, 2 Y. & C. Ex. 488.

(*k*) *Pooley* v. *Goodwin*, 4 A. & E. 94; *Walker* v. *Rostron*, 9 M. & W. 411; *Riccard* v. *Prichard*, 1 K. & J. 277. See *Jones* v. *Humphreys*, (1902) 1 K. B. 10.

assignment may be made of funds to be subsequently acquired, though the acquisition may depend on a contingency (*l*). Nor is it necessary that the precise amount of the debt to be paid should be ascertained (*m*).

iii.—Revocation of Assignment.—The mere sending an order to a depositary or debtor, to pay the proceeds or fund or debt to a creditor, does not constitute an equitable assignment in favour of the creditor. Until communicated to the creditor, the order is countermandable (*n*); but where such communication has been made, at all events after the fund holder has assented to the order or appropriation, the order cannot be revoked (*o*), either by the assignor or his trustee in bankruptcy (*p*).

Revocation of order on holder of fund.

The power to revoke the order seems to depend upon whether that order is a mere order for payment which is countermandable until acted upon, or amounts to an appropriation of the fund (*q*). Of course a direction, by a consignor to his correspondent and consignee, to appropriate all future consignments to the payment of a particular debt, is revocable by him at any time as to consignments not already made (*r*).

iv.—The Rule in Exp. Waring.—The well-known rule in *Exp. Waring* (*s*) lays down an apparent exception to the general principle that, in order to constitute a valid equitable assignment, there must be privity between the assignor and assignee.

The rule in *Exp. Waring* may be thus stated:—

Statement of the rule.

Where, as between the drawer and the acceptor of a bill of exchange, funds have, by virtue of a contract between them, been specifically appropriated to meet the bill at maturity, then, if both drawer and acceptor become bankrupt, the bill holder, though neither party to the contract nor privy to the appro-

(*l*) *Rodick* v. *Gandell*, 1 De G. M. & G. 763. See *Tailby* v. *Official Receiver*, 13 App. Ca. 543.

(*m*) *Hutchinson* v. *Heyworth*, 9 A. & E. 375.

(*n*) *Scott* v. *Porcher*, 3 Mer. 652; *Frith* v. *Forbes*, 4 De G. F. & J. 409, 422; *Bailey* v. *Culverwell*, 8 B. & Cr. 448; *Gaskell* v. *Gaskell*, 2 Y. & J. 502.

(*o*) *Hutchinson* v. *Heyworth*, 9 A. & E. 375; *Walker* v. *Rostron*, 9 M. & W. 411; *Dickinson* v. *Marrow*, 14 M. & W. 713; *Brandts & Co.* v. *Dunlop*, (1905) A. C. 454.

(*p*) *Alexander* v. *Steinhardt*, (1903) 2 K. B. 208.

(*q*) See *Fisher* v. *Miller*, 1 Bing. 150; *Gibson* v. *Minet*, 2 Bing. 7; *Brind* v. *Hampshire*, 1 M. & W. 364.

(*r*) *Malcolm* v. *Scott*, 15 Jur. 21.

(*s*) 19 Ves. 345.

priation, is entitled to have the appropriated fund applied towards payment of the bill. But the holders must have a double right of proof, or the rule does not apply. So there is no such right when the bills drawn by one party have not been accepted by the other (*t*).

No equitable assignment

The exception is, however, more apparent than real, for the bill holder is not treated as having an equitable assignment of the appropriated fund, but merely an incidental advantage arising out of the necessities connected with working out the equities between the two insolvent estates (*u*).

Rule applies to insolvent as well as bankrupt estates.

The rule in *Exp. Waring* applies not only to cases of bankruptcy in the strict sense of the term, but also where the estates are insolvent (*x*), provided that the respective estates have been brought under forced administration, whether of the Court of Bankruptcy or of the Chancery Division (*y*).

The rule applies to Ireland; and seems to apply though the security be deficient (*z*). But the rule does not apply to Scotland (*a*).

(*t*) *Vaughan* v. *Halliday*, L. R. 9 Ch. 561; *Exp. Dever*, 14 Q. B. D. 611.

(*u*) See per Lord Cairns in *Banner* v. *Johnston*, L. R. 5 H. L. 174. See also *Exp. Copeland*, 3 D. & C. 199; 2 M. & A. 177.

(*x*) *Re Barned's Banking Co.*, L. R. 10 Ch. 198.

(*y*) *Powles* v. *Hargreaves*, 3 De G. M. & G. 430; *Exp. Carmichael, Re Belfast Co.*, (1897) 1 Ir. R. 124. The rule in *Exp. Waring* belongs rather to the law regulating the administration of bankrupt and insolvent estates than to the law of hypothecation. An able discussion of the rule will be found in Mr. A. C. Eddis's treatise thereon. See also Williams on Bankruptcy (9th ed.), pp. 204 *et seq.*

(*z*) *Re Richview Brickworks Co.*, (1897) 1 Ir. R. 176.

(*a*) 7 App. Ca. 366.

CHAPTER LXV.

MARITIME HYPOTHECATIONS.

i. Nature, Operation, and Form of Bottomry Bonds.— Definition of bottomry.

Bottomry is a contract by which a ship, or a ship and freight, with the cargo (if necessary), is or are hypothecated by the owner, or by the master as the agent of the owner, as a security for the payment, in the event only of, and within a certain time after, the safe arrival of the ship at her destination, of a debt contracted, failing other sources, for the supply of what is necessary for the preservation of the ship and the continuance of the voyage (*a*).

Now fallen into disuse.

The necessity, however, for these instruments, to a great extent, disappeared when the Court held, in the *Mary Ann* (*b*) and the *Feronia* (*c*), that the master of a ship had what in practice amounted to a maritime lien for his disbursements. For over twenty years these decisions were regarded as law, and though they were overruled by the *Sara* (*d*), the Merchant Shipping Act, 1894 (*e*) has made the law to be what it was so long supposed to be; and it now seems improbable that bottomry bonds will ever again come into general favour (*f*).

Moreover, mortgages have taken the place of bottomry bonds granted by owners, and such bonds granted by masters are now seldom resorted to owing to the improved means of oversea communications.

Negotiability of bottomry bonds.

Before the Judicature Act, 1873 (*g*), a bottomry bond was not negotiable at law, but it was always treated as negotiable in the Courts of equity and admiralty (*h*); so that, in those Courts, a bondholder, whether he was a *bonâ fide* assignee, or whether the bond had been merely assigned to him as agent

(*a*) *Atlas*, 2 Hagg. Ad. 48; *Soares v. Rahn*, 3 Moo. P. C. 1; *Osmanli*, 3 W. Rob. Adm. 198; *Empusa*, 5 P. D. 6.
(*b*) L. R. 1 A. & E. 8.
(*c*) L. R. 2 A. & E. 65.
(*d*) 14 App. Ca. 209.
(*e*) Sect. 167.
(*f*) Abbott (14th ed.), 201.
(*g*) 36 & 37 Vict. c. 66.
(*h*) *Rebecca*, 5 C. Rob. Adm. 102; *William*, Swab. 346.

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for the original holder, would stand in the same position as such holder, with and subject to the same rights and liabilities. This rule of equity must now prevail in all Divisions of the High Court of Justice so as to enable the actual holder of a bond to sue upon it, although, inasmuch as a bottomry bond does not transfer property, but operates by way of charge only, it is clearly not within sect. 25, sub-sect. (6), of the last-mentioned Act (*i*).

Form of bottomry bond.

The bottomry bond is in writing, and may be under seal, and may be executed on land (*k*). No particular form is necessary (*l*). A bill of sale will suffice, if hypothecation is intended (*m*); but not if the intention were to effect a sale (*n*); and a bill of exchange, though on its face for repairs, will not operate by way of bottomry (*o*).

Bills of exchange are commonly given in practice as collateral securities, and as being more negotiable; but the nature of the original bottomry transaction is not affected thereby (*p*). And an agreement for a bottomry may be enforced if the other requisites exist (*q*).

Bottomry bonds favoured by Courts.

Bottomry bonds are favoured in maritime Courts, and every intendment will be made in their favour, and any parts which are inconsistent with the rules of bottomry may be rejected without invalidating the bond (*r*).

The validity of a bond is determined by the general law maritime, and not by the law of the ship's flag, or of the country where it is granted (*s*).

Time for execution of bond.

A bond may be valid, though its execution preceded (*t*) or followed (*u*) the loan; and it may be dated after the commencement or even completion of the voyage (*x*).

(*i*) See *ante*, pp. 321 *et seq.*

(*k*) *Menetone* v. *Gibbons*, 3 T. R. 267.

(*l*) *Atlas*, 2 Hagg. Ad. 48; *Alexander*, 1 Dods. 278; *Mary Ann*, L. R. 1 A. & E. 13.

(*m*) *Johnson* v. *Shippen*, 2 Ld. Raym. 982.

(*n*) *Ridgway* v. *Roberts*, 4 Ha. 106.

(*o*) *Eenrom*, 2 C. Rob. Adm. 1; *Exp. Halkett*, 19 Ves. 474; *Lochiel*, 2 W. Rob. Adm. 34.

(*p*) *Tartar*, 1 Hagg. Ad. 1; *Nelson*, 1 Hagg. Ad. 169; *Jane*, 1 Dods. 461; *Emancipation*, 1 W. Rob. Adm. 124; *Ariadne*, 1 W. Rob. Adm. 411; *Augusta*, 1 Dods. 283; *Stainbank* v. *Shepard*, 13 C. B. 418; *Exp. Halkett*, *sup.*

(*q*) *Alexander*, *sup.*; *Alina*, 1 W. Rob. Adm. 111.

(*r*) *Augusta*, *sup.*; *Osmanli*, 3 W. Rob. 198; *Smith* v. *Gould*, 4 Moo. P. C. 21.

(*s*) *Bonaparte*, 2 W. Rob. 398; *Duranty* v. *Hart*, 2 Moo. P. C. N. S. 289; *Lloyd* v. *Guibert*, L. R. 1 Q. B. 115.

(*t*) *Royal Arch*, Swab. 269.

(*u*) *Ysabel*, 1 Dods. 273; *Vibilia*, 1 W. Rob. 1; *Trident*, 1 W. Rob. 29.

(*x*) *Mary Ann*, 10 Jur. 253, Adm.

ii.—Subject-matter of Bottomry Bonds.—A bottomry bond given on a ship or on the keel of a ship includes the whole ship, with its rigging and stores, though temporarily detached (*y*).

Ship.

Where the circumstances are such as to justify the master in hypothecating the ship for necessaries, he has also authority to hypothecate the freight (*z*).

Freight.

In case of necessity, if the value of the ship and freight is not sufficient security for the amount required, the master may hypothecate the cargo as well as the ship and freight (*a*).

Cargo.

If the bottomry bond is of the ship, freight, and cargo, the ship and freight are liable first, then the cargo (*b*). If the ship only be hypothecated, the freight will not be liable to the bond-holder (*c*); nor the cargo (*d*). But if the ship and cargo, or the cargo alone, be the subject of the bond, the freight in the one case and the ship and freight in the other will still be liable before the cargo can be applied (*e*). The cargo cannot be bound without the ship and freight; although the bond purports only to affect the cargo, the proceeds of the ship and freight must be first applied (*f*). The right attaches to the cargo from necessity, and is measured by the degree of danger and the advances required, and the sufficiency of the ship and freight to meet the advances (*g*). In no case can the cargo be hypothecated until it is on board and under the control of the master (*h*).

Ship, freight, and cargo.

If the bond includes the cargo, the shipowner will be personally liable to pay to the owner of the cargo the amount raised on the credit thereof by reason of the insufficiency of the ship and freight; and this liability cannot be got rid of by abandoning the ship (*i*).

Liability of owner as to cargo.

The validity, as against cargo owners, of a bottomry bond entered into by the master of a foreign ship is not decided by the general maritime law as administered in England, nor by the *lex loci contractus*, but by the law of the ship's flag (*k*).

(*y*) *Atlas*, 2 Hagg. 48; *Alexander*, 1 Dods. 278.
(*z*) *Gratitudine*, 3 C. Rob. 240; *Jacob*, 4 W. Rob. 245.
(*a*) *Gratitudine, sup.*
(*b*) *Bonaparte*, 14 Jur. 605, Ad.; *Benson* v. *Duncan*, 3 Exch. 644.
(*c*) *Mary Ann*, 10 Jur. 253.
(*d*) *La Constantia*, 2 W. Rob. 404.
(*e*) *Prince Regent*, cited 2 W. Rob. 83; *Gratitudine*, 3 C. Rob. 240.
(*f*) *La Constantia, sup.*; *Bonaparte*, 8 Moo. P. C. 459.
(*g*) *Lord Cochrane*, 2 Moo. P. C. 320; *Gratitudine, sup.*; *Benson* v. *Duncan*, 3 Exch. 644.
(*h*) *Jonathan Goodhue*, Swab. 524.
(*i*) *Benson* v. *Duncan, sup.*
(*k*) *Gaetano and Maria*, 7 P. D. 137; *Pope* v. *Nickerson*, 3 Story, 465, notwithstanding *Gratitudine*, 3 C. Rob. 240; *Bonaparte*, 8 Moo. P. C.

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iii.—Charge on Ship, &c. created by Bottomry Bond.—A bottomry bond does not transfer the property in the ship, but only gives the creditor a privilege or claim upon it to be carried out by legal process (*l*).

Bond not a transfer of property.

Advance must be on credit of ship.

It is essential to the validity of a bottomry bond that the advance should have been originally made on the credit of the ship (*m*).

So far as the loan was made on personal credit, the security will not take effect by way of bottomry (*n*). So if the money is originally advanced on the personal credit of the owner,—as where a bill of exchange was given, and afterwards a bottomry bond was executed to the same lender,—the bond will be invalid on the ground that no security was intended to be given on the credit of the ship at the time of the advance (*o*).

But a bottomry bond may be valid if given to a person who advances money on the security of the ship for the purpose of paying off a debt incurred to another person, on the personal credit of the owner, for supply of necessaries (*p*).

If by agreement the time for payment is postponed, the contract, being no longer founded on the necessity of the ship, becomes personal, and loses its character of bottomry (*q*).

Owner not personally liable on bond.

By a bottomry bond the master gives a remedy *in rem* only to the extent of the value of the ship, and has no power to bind the owner personally (*r*). If he purports to do so, the bond will be *pro tanto* rejected, and confined in its operation to the property comprised therein (*s*). He cannot give to the lender a direct remedy on the bond itself against the owner as well as against the ship (*t*).

Set-off by charterer of ship.

The charterer of a ship in a foreign port, who, with notice of a prior mortgage of the ship, advances money for the equipment of the ship in her homeward voyage, cannot set off against the sum due under the charterparty the excess of the sum

459; *Duranty* v. *Hart, Hamburgh,* 2 Moo. P. C. N. S. 289.

(*l*) *Castrique* v. *Imrie,* L. R. 4 H. L. 414, at p. 431. See also *Stainbank* v. *Shepard,* 13 C. B. 418, Ex. Ch.

(*m*) *Ocean,* 2 W. Rob. 429.

(*n*) *Gore* v. *Gardiner,* 3 Moo. P. C. 79; *Beldon* v. *Campbell,* 6 Exch. 886. See *Karnak,* L. R. 2 P. C. 505.

(*o*) *Augusta,* 1 Dods. 283.

(*p*) *Hebe,* 2 W. Rob. 412.

(*q*) *Royal Arch,* Swab. 269.

(*r*) *Benson* v. *Duncan,* 3 Exch. 656.

(*s*) *Tartar,* 1 Hagg. 1; *Nelson,* 1 Hagg. 169; *Nostra Senora del Carmine,* 1 Spinks, 303.

(*t*) *Stainbank* v. *Shepard,* 13 C. B. 418, Ex. Ch.

advanced by him over the sum covered by the bottomry bond (*u*).

Right of bondholder on loss of ship.

If the ship is lost, the lender on a bottomry bond, though his remedy is limited to the value of the property saved, is entitled to the whole of what is saved, provided it was included in his security, or of the proceeds of sale thereof, as against the owner or a prior mortgagee of the ship (*x*).

Sum awarded for damage by collision.

If the loss of the ship is occasioned by collision with another ship by fault of the latter, the holder of the bottomry bond on the lost ship may recover against the owners of the ship in fault; and, if they limit their liability, and a sum is awarded as compensation for the loss, the bondholder is entitled to claim in respect of his security a portion of the sum awarded (*y*).

Personal liability of the master.

The instrument will not create any personal liability on the master unless there is an express stipulation to that effect. It is, however, usual for the master to bind himself personally; and, if he do so, the liability may be enforced, though it is usually treated as merely nominal (*z*).

Purchase of ship by master.

A bottomry bond is not invalidated by the fact that the master subsequently becomes the purchaser of the ship (*a*).

Bond cannot be renewed.

When a bottomry bond has become due it cannot be renewed so as to create a charge on the ship for necessaries supplied with a view to a fresh voyage; such a bond, so far as it might have any effect, would amount only to a personal contract (*b*).

Shipowner.

iv.—**Who may give a Bottomry Bond.**—A bottomry bond may be given by the owner, being or not being the master, or by the master (*c*). But if a bond is given by a part owner who acts as master, he has no authority beyond that of master (*d*).

Authority of managing owner.

A managing owner, registered as such, has not *per se* authority to bind all part owners when they are not interested in the adventure (*e*), although the latter have allowed the registry to remain unaltered.

Extent of owner's power to give bond.

A shipowner who is not master may give a bottomry bond

(*u*) *Dobson* v. *Lyall*, 2 Ph. 323, n.
(*x*) *Stephens* v. *Broomfield, Great Pacific*, L. R. 2 P. C. 516, at p. 523.
(*y*) *Empusa*, 5 P. D. 6.
(*z*) *Jonathan Goodhue*, Swab. 524; *Salacia*, Lush. 545.
(*a*) *Heligoland*, Swab. 491.
(*b*) *Royal Arch*, Swab. 269.
(*c*) *Barbara*, 4 C. Rob. 1; *Duke of Bedford*, 2 Hagg. 294; *Heligoland*, Swab. 491.
(*d*) *Orelia*, 3 Hagg. 75.
(*e*) *Frazer* v. *Cuthbertson*, 6 Q. B. D. 93.

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without the concurrence of the master (*f*); but only for the necessary supplies of the ship, and in a foreign port (*g*). It is said that the granting of a bond by the shipowner would generally be, but probably amount to no more than, strong evidence of the necessity (*h*).

Authority of master to give bond.

It is the duty of a master, in case of damage to the ship, to do all that can be reasonably done to repair it, bring home the cargo, and earn the freight. He has also power to sell the ship if there is no reasonable prospect of bringing her safely to the end of her voyage (*i*). Where, in case of damage to a ship, the master elects to repair it, the mere fact that the expenses of repair ultimately prove to be greater than the value of the ship, will not be sufficient to show that he acted beyond the scope of his authority (*k*).

Communication with owner.

Before resorting to bottomry, the master must give notice to the owner (if practicable) (*l*); and the communication must, if possible, be made by telegraph (*m*). The bankruptcy of the owner is no excuse (*l*), and notice to the mortgagee is not sufficient (*l*); nor is the master bound to communicate with the mortgagee (*n*); nor are advertisements for a loan on bottomry in the port where the owner resides notice to him (*o*); but a letter from a British consul is (*p*); and if communication has been made, the master need not wait for an answer if the delay would endanger the safety of the ship or cargo (*q*).

No means of communication.

But the power of giving a bond exists without communication, although the owner resides in the same country, if there is no means of communicating with him and the exigency of the case requires the bottomry bond (*r*); but otherwise if the communication is easy (*s*). But notwithstanding what has been said above, a bottomry bond given by the captain for

(*f*) *Duke of Bedford*, 2 Hagg. 294; *Barbara*, 4 W. Rob. 1.
(*g*) *Royal Arch*, Swab. 269; *Heligoland*, Swab. 491.
(*h*) Abbott on Ships (1892 ed.), 165. See *Royal Arch*, *sup.* at p. 275.
(*i*) *Hunter* v. *Palmer*, 7 M. & W. 396.
(*k*) *Benson* v. *Chapman*, 2 H. L. C. 696.
(*l*) *Panama*, L. R. 3 C. P. 199.
(*m*) *Oriental*, 7 Moo. P. C. 398.
(*n*) *Heligoland*, 1 Swab. 491.
(*o*) *Nuova Loanese*, 17 Jur. 263; *Soares* v. *Rahn*, 3 Moo. P. C. 1.
(*p*) *Bonaparte*, 8 Moo. P. C. 459.
(*q*) *Wallace* v. *Fielden*, 3 W. Rob. 243; *Olivier*, Lush. 484. And see *Australasian Steam Navigation Co.* v. *Morse*, L. R. 4 P. C. 222.
(*r*) *Wallace* v. *Fielden*, *sup.*; *Ysabel*, 1 Dods. 273; *Trident*, 1 W. Rob. 29. See *Johns* v. *Simons*, 2 Q. B. 425; *Arthur* v. *Barton*, 6 M. & W. 138; *Lochiel*, 2 W. Rob. 34; *Stainbank* v. *Fenning*, 11 C. B. 51; *Beldon* v. *Campbell*, 6 Exch. 886.
(*s*) *Johns* v. *Simons*, *sup.*; *Stonehouse* v. *Gent*, 2 Q. B. 431, n.

repairs done abroad will not be invalidated by the fact that the captain might have communicated with the shipowners in England for the purpose of obtaining supplies, even in favour of a mortgagee of the ship; and if the action allege fraud which is not proved, the Court will, contrary to the general rule, instead of dismissing the action, direct inquiries, for the benefit of the defendant, as to the amount due to him on the bond (*t*).

Master is not supercargo.

A master of a ship who borrows money on bottomry for the repairs of the ship acts exclusively as the agent of the owner of the ship; he does not act as a sort of supercargo for the benefit of the owner of the cargo (*u*).

The owner of the ship is liable for the act of the master, though he sold the cargo under a mistake, if he acted *bonâ fide* within the scope of his authority (*x*). Every act not strictly in furtherance of the duty to deliver is an act for which the master and his owners may be made responsible (*y*); and this more strictly where the master has the means of communicating with the owner of the cargo (*z*); but the cargo is not bound if the repairs are done before the execution of the bond and the actual shipment of the cargo (*a*).

The shipper must be reimbursed.

For money raised by pledge of the cargo or sale of part of it for the purpose of repairing the vessel, the shipper has a right to be reimbursed by the shipowner all loss or expenses arising from such pledge or sale, though the ship and cargo be pledged by the same instrument, and the money raised thereby exceeds the value of the ship as repaired together with the freight, and notwithstanding the shipowner, on receiving notice, refuses to ratify the act of the master, and abandons the ship and freight (*b*).

Bottomry bond cannot be given for previous debt.

A master has no power to give a bottomry bond or to assign freight to secure a debt of the shipowner (*c*), nor debts already incurred for the ship (*d*), though by the law of the country the

(*t*) *Glascott* v. *Lang*, 2 Ph. 310.
(*u*) *Benson* v. *Duncan*, 3 Exch. 644, Ex. Ch.
(*x*) *Ewbank* v. *Nutting*, 7 C. B. 797. See *Wagstaffe* v. *Anderson*, 5 C. P. D. 171, 180.
(*y*) *Ewbank* v. *Nutting*, *sup.*; *Morris* v. *Robinson*, 3 B. & Cr. 196.
(*z*) *Gratitudine*, 3 C. Rob. 241; *Wilkinson* v. *Wilson*, 8 Moo. P. C. 459; *Duranty* v. *Hart*, 2 Moo. P. C. N. S. 289; *Wallace* v. *Fielden*, 7 Moo. P. C. 398; *Kleinwort* v. *Cassa Marittima*, 2 App. Cas. 156.
(*a*) *Jonathan Goodhue*, Swab. 524.
(*b*) *Benson* v. *Duncan*, 3 Exch. 644.
(*c*) *Sir Henry Webb*, 13 Jur. 639. See *Gibbs* v. *Charleton*, 26 L. J. Ex. 321.
(*d*) *Re Osmanli*, 3 W. Rob. 198.

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ship may be arrested for the debts (*d*); nor for services already rendered (*e*); nor for debts to be incurred on a future voyage except under peculiar circumstances (*f*); nor general average (*g*); nor charges exclusively relating to the cargo (*h*); nor are advances allowed for debts incurred on former voyages, or for other ships (*i*).

So far as the loan was made on personal credit, the security will not take effect by way of bottomry (*k*).

Consignee of cargo may take a bottomry bond.

v.—Who may take a Bottomry Bond.—It is no objection to the validity of a bottomry bond that it is given to the consignee of the cargo, provided the necessity of borrowing money on such security and other circumstances justify the transaction (*l*).

Agent of ship.

The agent of the ship acting *bonâ fide* may take a bottomry bond (*m*). But in such a case the transaction is vigilantly regarded, for when the agent and the lender are blended in one, the owner is deprived of the protection expected from a paid agent; and, moreover, an agent, unlike a stranger, who lends money on a bottomry bond, must not only satisfy himself that the money is required, but is bound to see that it is properly applied for necessary expenses (*n*).

Debtor to ship.

A person who is in debt to a ship or her owners cannot advance money on bottomry so as to entitle him to the benefit of the security for a greater amount than the excess of his loan over his debt, because, to the extent of the debt, the money required for necessaries might have been provided without recourse to a bottomry bond (*o*).

Maritime risk.

vi.—Maritime Risk and Interest, &c.—A master has no authority to hypothecate the ship to secure advances for repairs, with or without maritime interest, except by an instrument which is to take effect only in the event of the ship's safe

(*d*) See previous page.
(*e*) *Beldon* v. *Campbell*, 6 Exch. 8; *Lochiel*, 2 W. Rob. 34; *Gore* v. *Gardiner*, 3 Hagg. 404.
(*f*) *Lochiel*, *sup.*
(*g*) *North Star*, Lush. 45.
(*h*) *Edmond*, Lush. 57.
(*i*) See *Lochiel*, 2 W. Rob. 34; *Osmanli*, 3 W. Rob. 198; *Toivo*, 1 Spinks, 185; *Smith* v. *Gould*, 4 Moo. P. C. 21; *Edmond*, *sup.*
(*k*) *Gore* v. *Gardiner*, 3 Hagg. 404; *Beldon* v. *Campbell*, 6 Exch. 8. And see *Karnak*, L. R. 2 P. C. 505.
(*l*) *Alexander*, 1 Dods. 278; *Rubicon*, 3 Hagg. 9.
(*m*) *Oriental*, 14 Jur. 336, Ad.; *Hero*, 2 Dods. 144; *Smith* v. *Bank of New South Wales*, L. R. 4 P. C. 194, 203. See *Wallace* v. *Fielden*, 7 Moo. P. C. 398.
(*n*) *Royal Stuart*, 2 Spinks, 258, 260. See *Prince of Saxe-Coburg*, 3 Moo. P. C. 1, 9.
(*o*) *Hebe*, 2 W. Rob. 412, 416.

arrival (*p*). Maritime risk is an important element in determining the effect of a bottomry bond (*q*).

When bonds are made payable.

The bond is commonly made payable a short time after the arrival of the ship at her destination (*r*); and it must express or imply that the loan is risked upon the arrival of the ship (*s*). But an intention to incur maritime risk may be implied upon the construction of the instrument as a whole (*t*).

Bond must not cover insurance.

So if a bottomry bond is given to secure principal, interest and insurance, it will be disallowed to the extent to which it purports to cover insurance, as otherwise the lender would avoid the maritime risk which he had undertaken as an essential condition of the bond (*u*).

Intention to incur maritime risks.

Where it was doubtful upon the terms of the instrument whether there was an intention to incur maritime risk, it was considered material that interest only at an ordinary rate was reserved (*x*).

Rate of interest not stated.

Where by mistake the rate of interest was left in blank, the Court refused to supply the omission by allowing interest at the agreed rate; but interest was allowed at the rate prevalent at the time and place of execution of the bond, having regard to the risk incurred (*y*).

Maritime interest allowed though risk not wholly incurred.

The whole of the agreed interest on a bond has been allowed although circumstances prevented the completion of the voyage, so that the whole maritime risk undertaken by the lender was not incurred; but it was said in that case that if the ship had never started on her voyage after the repairs, so that the lender would not have incurred any maritime risk whatever, maritime interest would not have been allowed (*z*). In such cases the bondholder will be entitled to his principal and interest at the ordinary rate, and costs (*a*).

Stipulation for immediate payment.

A stipulation that in the event of the ship putting into a port

(*p*) *Elephanta*, 15 Jur. 1185; *Stainbank* v. *Fenning*, 11 C. B. 51.

(*q*) *Indomitable*, Swab. 446; *Atlas*, 2 Hagg. 48; *Royal Arch*, Swab. 269.

(*r*) *Duke of Bedford*, 2 Hagg. 294; *North Star*, Lush. 45.

(*s*) *Nelson*, 1 Hagg. 169; *Atlas*, *sup.*; *Stainbank* v. *Fenning*, 11 C. B. 51; *Stainbank* v. *Shepard*, 13 C. B. 418, Ex. Ch.; *Mary Ann*, L. R. 1 P. D. & A. 13; *Smith* v. *Bank of New South Wales*, L. R. 4 P. C. 194.

(*t*) *Nelson*, *sup.*; *Royal Arch*, Swab. 269; *Simonds* v. *Hodgson*, 3 B. & Ad. 50.

(*u*) *Boddington*, 2 Hagg. 422. See *Indomitable*, Swab. 446.

(*x*) *Emancipation*, 1 W. Rob. 124; *Royal Arch*, Swab. 269.

(*y*) *Change*, Swab. 240.

(*z*) *Dante*, 2 W. Rob. 427, 429.

(*a*) *De Guilder* v. *Depeister*, 1 Vern. 263; *Aline*, 1 W. Rob. 111; *Dante*, *sup.*

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of refuge for repair, all moneys for which the ship has been pledged shall forthwith become payable, does not invalidate the bond, provided a maritime risk is in the contemplation of the parties (*b*).

Interest allowed at 4 per cent. on bond due till payment.

The practice of the Court is to allow interest at 4*l*. per cent. from the date of the instrument of bottomry becoming payable until payment thereof, and no additional payment by way of premium or otherwise, in default of punctual payment, will be enforced (*c*).

Reduction of exorbitant interest.

The Court has authority to inquire into the reasonableness of the terms of a bottomry bond; and accordingly, if the rate of maritime interest charged is altogether exorbitant, having regard to the maritime risk incurred, the interest will be reduced to a reasonable rate (*d*).

Commission and premiums.

So, also, the Court will reduce commissions and premiums secured by a bond if such charges are so exorbitant as to be contrary to good faith (*e*); but the Court will exercise caution in pronouncing against a bond merely on account of the large amount of such charges (*f*).

vii.—Necessity essential to Validity of Bottomry Bond.—The existence of a two-fold necessity is essential to the validity of a bottomry bond, that is to say—first, the ship must be in distress, and urgently in need of repairs and supplies to enable her to proceed on her voyage; and, secondly, it must be impossible to raise the money required for such repairs and supplies, except by hypothecating the ship.

Inquiry by lender as to necessities of ship, &c.

But, though necessary repairs and want of funds are essential elements, which give existence and validity to a bottomry bond, *bonâ fide* inquiries of the foreign merchant on all these points are sufficient, even though the answers received by him are at variance with the facts (*g*).

There must be necessity for repairs, &c.

It being essential to the validity of a bottomry bond that the money advanced should be required for the necessaries of the ship, the master's authority to borrow money on the

(*b*) *Haabet*, (1899) P. 295.
(*c*) *Sophia Cook*, 4 P. D. 30.
(*d*) *Zodiac*, 1 Hagg. 320; *Cognac*, 2 Hagg. 377; *Royal Arch*, Swab. 269; *Laurel*, Br. & L. 191.
(*e*) *Huntley*, Lush. 24; *Glenmanna*, Lush. 115; *Heart of Oak*, 1 W. Rob. 204, 215.
(*f*) *Cognac*, 2 Hagg. 377, at p. 392; *Dante*, 2 W. Rob. 427.
(*g*) *Soares* v. *Rahn*, 3 Moo. P. C. 1; *Wallace* v. *Fielden*, 7 Moo. P. C. 398; *Nelson*, 1 Hagg. 169; *Gore* v. *Gardiner*, 3 Moo. P. C. 79; *Dunvegan Castle*, 3 Hagg. 331.

security of a bond is based on, and strictly limited by, this necessity (*h*). But the Court will not look too narrowly into the items supplied, or the amount of the charges for necessary repairs (*i*).

A vessel belonging to a port in this country cannot be made the subject of a bottomry bond in another port of this country (*k*), if communication can be had with the owner (*l*); and not even with the consent of the owner for a new voyage, lest a secret lien, not appearing on the ship's papers, should be created (*m*).

Foreign port.

A bond may be given in a foreign port for the completion of the voyage (*n*), or for the return voyage (*o*), and for a new voyage from a foreign port, but not without the consent of the owner (*p*).

Home port.

In relation to the rights and remedies of persons having claims for repairs done to, or supplies furnished to or for, ships, every port within the United Kingdom of Great Britain and Ireland, the Islands of Man, Guernsey, Jersey, Alderney, and Sark, and the islands adjacent to any of them, being part of the dominions of his Majesty, shall be deemed a home port (*q*).

Meaning of "necessity."

With regard to the meaning of "necessity," with reference to the authority of a master to give a bottomry bond, it is obvious that much must depend upon the circumstances of the particular case (*r*). So it has been said that "any combination of events, which would prevent the completion of the voyage with profit, unless the money should be obtained by bottomry, would raise the question, whether there was need of bottomry in such a high degree as to create a necessity" (*s*).

No other funds must be

No bond is valid where the agent of the shipowner has funds

(*h*) *Pontida*, 9 P. D. 177, C. A.

(*i*) *Royal Arch*, Swab. 269; *Calypso*, 3 Hagg. 162.

(*k*) *Lochiel*, 2 W. Rob. 34. See *Micheson* v. *Oliver*, 5 E. & B. 419.

(*l*) *Ysabel*, 1 Dods. 273; *Trident*, 1 W. Rob. 29.

(*m*) *Johnson* v. *Shippen*, 2 Ld. Raym. 982; *Royal Arch*, Swab. 269; *Jenny*, 2 W. Rob. 5.

(*n*) *Vibilia*, 1 W. Rob. 1; *Lloyd* v. *Guibert*, L. R. 1 Q. B. 115.

(*o*) *Nelson*, 1 Hagg. 169.

(*p*) *Royal Arch*, *sup.*; *Lister* v. *Baxter*, 2 Stra. 695.

(*q*) 19 & 20 Vict. c. 97, s. 8. See also 57 & 58 Vict. c. 60, s. 742.

(*r*) *Soares* v. *Rahn*, 3 Moo. P. C. 1; *Smith* v. *Gould*, 4 Moo. P. C. 21; *Edmond*, Lush. 57, 211; *Zodiac*, 1 Hagg. 320; *Duke of Bedford*, 2 Hagg. 294; *Gauntlet*, 3 W. Rob. 82; *Gore* v. *Gardiner*, 3 Moo. P. C. 79; *Parmeter* v. *Todhunter*, 1 Camp. 541; *Toivo*, Spinks, 185.

(*s*) Per Erle, C.B., in *Karnac*, L. R. 2 P. C. 505, at p. 512.

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in hand (*t*), or the master can obtain the necessary advances upon the personal credit of the owner (*u*); but such bond will not be invalidated by the fact that a part of the sum secured by the bond might have been raised from other funds which were at the command of the captain; but an account will be directed (*x*).

available for repairs, &c.

Supplies already furnished.

A bottomry bond cannot, therefore, be given to secure previous advances to pay for supplies already furnished on the credit of the owner (*y*).

Where there is an agent at the port.

So, also, a bond will be bad if given to a person who advances the money with knowledge, or reasonable means of knowledge, that the owner had an agent in the port (*z*).

Priority over mortgage.

viii.—**Priority of Bottomry Bonds.**—A bottomry bond given under circumstances of urgent necessity by the master, or by the owner, will take precedence over a prior mortgage of the ship (*a*). But without such necessity a secret lien on the ship will not be allowed to prevail against a registered mortgage (*b*).

Relief against fraud of owner.

Dealings with a ship by the owner, which amount to a fraud on the mortgagee of the ship, and render the voyage illegal, will not prejudice the priority of a person advancing money on a bottomry bond, who has only to look to the facts that the ship is in distress, that the master has no credit, and that the amount is required for necessary purposes (*c*).

Last bond has priority.

As between bottomry bonds *inter se* given at different periods of the voyage, if the value of the ship is insufficient to discharge them all in full, the last bond in point of date ranks in priority over the earlier ones, on the ground that, but for the supply of necessaries on the security of that bond, the security of the earlier bondholders might have been lost (*d*).

Such priority based on salvage.

But this priority rests entirely on the ground of salvage, and the holder of the last bond will not be entitled thereto, unless the ship was in distress and the master was unable to raise the

(*t*) *Lyall* v. *Hicks*, 27 Beav. 166; *Hebe*, 2 W. Rob. 146, 412.

(*u*) *Wallace* v. *Fielden*, 7 Moo. P. C. 398; *Prince of Saxe-Coburg*, 3 Moo. P. C. 1.

(*x*) *Dobson* v. *Lyall*, 3 My. & Cr. 453, n.; *Heart of Oak*, 1 W. Rob. 204; *Smith* v. *Gould*, 4 Moo. P. C. 21.

(*y*) *Karnak*, L. R. 2 A. & E. 289.

(*z*) *Faithful*, 31 L. J. Ad. 81. See *Gunn* v. *Roberts*, L. R. 9 C. P. 331.

(*a*) *Duke of Bedford*, 2 Hagg. 294.

(*b*) *Royal Arch*, Swab. 269, 276.

(*c*) *Mary Ann*, L. R. 1 A. & E. 13.

(*d*) Abbott on Ships (14th ed.), 213. See *Eliza*, 3 Hagg. 87; *Rhadamanthe*, 1 Dods. 201; *Priscilla*, Lush. 1.

amount required for necessary repairs and supplies otherwise than upon the security of such bond (*e*).

Loss of priority by laches.

A bondholder may lose priority over other incumbrancers of the ship by laches in neglecting to enforce his bond within a reasonable time (*f*).

Lien for wages.

A bottomry bond will be postponed to the lien on ship and freight, for wages of a seaman, or of his master (*g*), at all events so far as relates to wages earned after the bond was given (*h*).

The master's lien, however, will not generally prevail against the bondholder, if the master is personally liable on the bond (*i*).

Marshalling.

Where a bond comprises not only the ship and freight but also the cargo, but the master's claim for wages was only on the ship and freight, which were insufficient to satisfy the bond, the assets were marshalled, though the master was personally liable on the bond (*k*). But where the owners of ship and freight and the owners of cargo are different persons, the principle of marshalling cannot be applied; for the Court will not direct assets to be marshalled except in cases where the two funds to which one of the creditors can resort belong to the same person (*l*).

Lien for salvage.

On the same principle which gives priority to the last bottomry bond on the ground of salvage, it seems clear that a lien for services of the nature of salvage rendered subsequently to the giving of such a bond will take precedence over the bond; and this point has been expressly decided with regard to a *respondentia* bond on the cargo of a ship (*m*).

Lien for damage by collision.

Lien for damage by collision takes precedence over a prior bottomry bond, as the owner can confer on the bondholder no right greater than he had himself, that is to say, a right subject to claims for subsequent damage to the ship (*n*). A bottomry bond given for supply of necessaries subsequent to a collision will not apparently give way as a matter of course to prior claims of damage, for it is the interest of the person who has received the damage that the vessel be repaired and enabled to proceed to her port of destination (*o*).

(*e*) *Brice* v. *Williams*, Wallis, 325.
(*f*) *Royal Arch*, Swab. 269, 284. And see cases cited in the judgment.
(*g*) *Salicia*, Lush. 545.
(*h*) See *Janet Wilson*, Swab. 261.
(*i*) *Jonathan Goodhue*, Swab. 524.
(*k*) *Edward Oliver*, L. R. 1 A. & E. 379; *Eugenie*, L. R. 4 A. & E. 123.
(*l*) *Chioggia*, (1898) P. 1.
(*m*) *Cleary* v. *M'Andrew*, 2 Moo. P. C. N. S. 216.
(*n*) *Aline*, 1 W. Rob. 118.
(*o*) Per Dr. Lushington, *ibid.*

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ix. Discharge of Bottomry Bonds.—A bottomry bond can only be discharged by payment or by an absolute total loss and destruction of the ship, and of the cargo, if included in the security (*p*). So abandonment of the voyage will not discharge the security (*q*).

Loss of ship.

Capture in war.

In time of war, however, if the security is upon a ship which is captured by an enemy, the captors seize the gross tangible property without regard to any claims upon it as between the owners and other persons, whether by way of mortgage (*r*), bottomry (*s*), or lien (*t*), for purchase-money, or on any other account (*u*).

Collision.

A bottomry bond on freight in case the ship is lost by collision, attaches upon a sum of money awarded against the other ship for freight (*x*).

Jurisdiction.

x.—Enforcement of Bottomry Bonds.—The Admiralty Division of the High Court exercises jurisdiction relating to bottomry and matters of freight (*y*).

Procedure.

The proper mode of enforcing a bottomry bond is by proceedings *in rem*. Upon the arrival of the ship in this country, if the loan is not repaid within the time prescribed, the agent of the lender applies to the Admiralty Division, producing the bond and an affidavit of the facts, and obtains a warrant for the arrest of the ship, citing all persons interested to appear (*z*). The original bond must as a rule be produced at the hearing (*a*).

Order for sale.

The Court has power to decree a sale of the ship, and such decree may be made if the owners or other persons interested fail to put in an appearance; the Court will distribute the proceeds of sale among the persons interested according to their respective rights (*b*).

Definition of "*respondentia.*"

xi.—Respondentia.—The contract of *respondentia* is a security upon the cargo only, founded upon the same necessity for the preservation of the property. It may be defined as

(*p*) *Broomfield* v. *Southern Ins. Co.*, L. R. 5 Ex. 192, at p. 196.
(*q*) *Heligoland*, 1 Swab. 491.
(*r*) *Aina*, 18 Jur. 681.
(*s*) *Tobago*, 5 C. Rob. 218.
(*t*) *Marianna*, 6 C. Rob. 24; *Ida*, 18 Jur. 752.
(*u*) See *Sorensen* v. *Reg.*, 11 Moo. P. C. 119.
(*x*) *Empusa*, 5 P. D. 6.
(*y*) 36 & 37 Vict. c. 66, s. 5.
(*z*) Abbott on Ships (14th ed.), 195.
(*a*) *Rowena*, 3 Asp. M. C. N. S. 506; Ord. V. rr. 16, 17.
(*b*) *Tremont*, 1 W. Rob. 163.

the hypothecation of cargo laden on board of ship to secure an advance, the repayment whereof is made to depend on the safe arrival of the cargo.

Respondentia is governed by the same principles as the contract of bottomry, but binding (it is said) the borrower personally (*c*), and is to secure the necessary costs of transhipping and forwarding the cargo to its destination (*d*). It is also subject to the like rules respecting maritime risk and interest, and the rejection of void stipulations, as a bottomry bond (*e*).

Communication with owner of cargo.

The master has no power to sell damaged goods or cargo (*f*), or to hypothecate the cargo for the exigencies of the ship (*g*), without communicating with the owner thereof; and notice should be given to the owners of the cargo before it is hypothecated on bottomry, or *respondentia* (*h*), unless the shipper of the goods is on the spot, and cognizant of the bottomry or *respondentia* (*i*); and unless owners are so numerous and remote that the expense and hazard of keeping the cargo pending the communication would probably be equivalent to its loss (*k*).

The effect of the contract depends on the form of the instrument; and although the recital stated that the loan was on the goods laden or to be laden, the borrower was only personally liable (*l*).

Master's lien not affected by arrest of cargo.

The arrest of cargo by the holder of a *respondentia* bond before it has reached its destination will not affect the master's possessory lien on the cargo for freight and general average.

And if the cargo is carried to its destination either by the master, or, on his abandoning the contract, by the underwriters, the bond will be subject to lien for the full freight (*m*).

Disuse of *respondentia*.

Respondentia bonds have fallen almost entirely into disuse, owing to the unsatisfactory nature of the security.

(*c*) See *Busk* v. *Fearon*, 4 East, 319.
(*d*) *Cargo ex Sultan*, Swab. 504.
(*e*) *Cognac*, 2 Hagg. 377.
(*f*) *Australasian Steam Navigation Co.* v. *Morse*, L. R. 4 P. C. 223; *Acatos* v. *Burns*, 3 Ex. D. 282; *Onward*, L. R. 4 A. & E. 38.
(*g*) *Wilkinson* v. *Wilson*, 8 Moo. P. C. 259.
(*h*) *Duranty* v. *Hart*, 2 Moo. P. C. N. S. 289; *Onward*, L. R. 4 A. & E. 38.
(*i*) *Lord Cochrane*, 2 W. Rob. 320. But see *Nuova Loanese*, 17 Jur. 263.
(*k*) *Cargo ex Sultan*, Swab. 504; *Australasian Steam Navigation Co.* v. *Morse*, L. R. 4 P. C. 223; *Duranty* v. *Hart*, 2 Moo. P. C. N. S. 289.
(*l*) *Busk* v. *Fearon*, 4 East, 319.
(*m*) *Cargo ex Galam*, 2 Moo. P. C. N. S. 216.

APPENDIX.

STAMP DUTIES.

Stamp Act, 1891.

The principal Act at present in force relating to stamps on mortgages is the Stamp Act of 1891 (*a*), and it applies to the United Kingdom of Great Britain and Ireland.

The Act defines the expression "mortgage" for purposes of stamp duty as follows:—

Meaning of "mortgage."

Sect. 86.—"(1.) For the purposes of this Act the expression 'mortgage' means a security by way of mortgage for the payment of any definite and certain sum of money advanced or lent at the time, or previously due and owing, or forborne to be paid, being payable, or for the repayment of money to be thereafter lent, advanced, or paid, or which may become due upon an account current, together with any sum already advanced or due, or without, as the case may be."

Definite and certain sum.

The words "definite and certain" refer to the amount secured, not to the certainty of payment. So a specified sum secured by a mortgage of a reversionary interest payable only in the event of the mortgagor surviving the tenant for life was held to be a definite and certain sum notwithstanding that it was payable only in the event named (*b*). So, also, a security to indemnify a surety was held to be liable to *ad valorem* duty upon the sum for which the surety had made himself liable (*c*). A security for future contingent payments is as much within the words and meaning of the statute as a security for certain future payments (*d*).

The term "definite and certain sum" means the principal sum mentioned, and no additional stamp is required for interest, even though in arrear, unless capitalised and made part of the principal sum (*e*); nor for commission (*f*); or for costs incurred in recover-

(*a*) 54 & 55 Vict. c. 39.
(*b*) *Mortimore* v. *Commrs. of Inland Revenue*, 2 H. & C. 820.
(*c*) *Canning* v. *Raper*, 1 E. & B. 164.
(*d*) *Ibid.*
(*e*) *Barker* v. *Smark*, 7 M. & W. 590; *Pierpoint* v. *Gower*, 4 Man. & Gr. 795; *Daines* v. *Heath*, 3 C. B. 938.
(*f*) *Frith* v. *Rotherham*, 15 M. & W. 39.

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ing the debt with interest (*g*); or for taxes, rates, duties, and assessments payable in respect of the mortgaged property or debt and interest (*h*); or costs incurred in the renewal of leases or otherwise (*i*); or premiums on policies and costs of obtaining new policies (*k*). The mortgagee is entitled without express provision in the instrument to add these charges to his debt, and the expression of that which the law allows does not affect the stamp duty. Such payments are not sums to be thereafter lent, advanced, or paid within the contemplation of the Stamp Act, and do not therefore require a further stamp (*l*).

Where a trust deed for securing debenture stock provided that the issue of the stock should in the first instance be limited to 300,000*l*., that a further issue might be made of 540,000*l*., that the further issue should only be made for the purpose of paying off certain existing debenture stock, and that the redeemed debenture stock should be transferred to the trustees of the deed; it was held that the deed was a mortgage within sect. 86 (1), and was chargeable with duty on the total amount of 840,000*l*. (*m*).

By sect. 12, sub-sect. 6 (b) the Commissioners are not bound to adjudicate on a security for money or stock without limit (*n*).

Further advances.

With regard to stamp duty on securities which are intended to cover not only a sum advanced at the time when the security is effected, but also further advances of an uncertain or unlimited amount, the Act of 1891 enacts as follows:—

Security for further advances, how to be charged.

Sect. 88.—"(1.) A security for the payment or repayment of money to be lent, advanced, or paid, or which may become due upon an account current, either with or without money previously due, is to be charged, where the total amount secured or to be ultimately recoverable is in any way limited, with the same duty as a security for the amount so limited.

"(2.) Where such total amount is unlimited, the security is to be available for such an amount only as the *ad valorem* duty impressed thereon extends to cover, but where any advance or loan is made in excess of the amount covered by that duty the security shall for the purpose of stamp duty be deemed to be a new and separate instrument, bearing date on the day on which the advance or loan is made.

"(3.) Provided that no money to be advanced for the insurance of any property comprised in the security against damage by fire, or for keeping up any policy of life insurance comprised in the security, or for effecting in lieu thereof any new policy, or for the renewal of any grant or lease of any property comprised in the security upon the dropping of any life

(*g*) *Doe* v. *Snaith*, 8 Bing. 146.
(*h*) *Doe* v. *Bragg*, 8 A. & E. 620.
(*i*) *Wroughton* v. *Turtle*, 11 M. & W. 561; *Doe* v. *Larder*, 3 Bing. N. C. 92; *Lysaght* v. *Warren*, 10 Ir. L. R. 269. See sect. 88 (3).
(*k*) *Lawrance* v. *Boston*, 7 Exch. 28; *Halse* v. *Peters*, 2 B. & Ad. 807. See sect. 88 (3).
(*l*) See the judgment of Parke, B., in *Wroughton* v. *Turtle, sup.* And see *Paddon* v. *Bartlett*, 2 A. & E. 9.
(*m*) *City of London Brewery Co.* v. *Commrs.*, (1899) 1 Q. B. 121, C. A.
(*n*) *Suffield* v. *Commrs.*, (1908) 1 K. B. 865.

whereon the property is held, shall be reckoned as forming part of the amount in respect whereof the security is chargeable with *ad valorem* duty."

The section contemplates that the primary security may be a deed on which at the time it was executed no money was lent or advanced (*o*).

Where a mortgage, expressed to be made for securing the repayment or re-transfer of an uncertain and unlimited amount of money, was stamped with an adjudication stamp, the Court disregarded the adjudication, and held that the instrument was admissible in evidence, and available for such amount of money intended to be thereby secured as the *ad valorem* duty denoted by the stamp thereon would extend to cover (*p*).

A mortgage to secure an indefinite sum, where a subsequent proviso limits the principal sum to be secured, is not for an indefinite sum (*q*).

The Customs and Inland Revenue Act, 1888 (*r*), allowed equitable mortgages made to secure an uncertain or unlimited amount to be made available for an amount in excess of that covered by the stamp impressed thereon; and, by the Act of 1891, this facility was extended to all securities (*s*).

A provision as to insurance against fire, or as to keeping up a life policy, does not alter the *ad valorem* stamp on the mortgage (*t*).

It is not the practice to stamp a mortgage with extra *ad valorem* duty owing to its containing a provision charging the costs of repairs done by the mortgagee on the mortgaged property (*u*).

Duty payable on amount secured.

The *ad valorem* duty on a mortgage must be calculated upon the amount of the principal secured, not upon the value of the property, whether such value be greater or less than the amount secured.

With regard, however, to mortgages which are intended to secure the repayment of an advance in foreign currency, or the replacement of a sum of stock, the Act of 1891, s. 6, as amended by the Finance Act, 1899, s. 12, prescribes the mode of calculating *ad valorem* duty in certain cases.

What are "mortgages" within the statutory definition.

The term "mortgage" in the Act includes (*x*):—

"Conditional surrender by way of mortgage, further charge, wadset, and heritable bond, disposition, assignation, or tack in security, and eik,

(*o*) *Ibid.*

(*p*) *Morgan* v. *Pike*, 14 C. B. 473.

(*q*) *Doe* v. *Warner*, 2 C. & K. 1014. And see *Frith* v. *Rotherham*, 15 M. & W. 39; *Lloyd* v. *Heathcote*, 1 Cr. & M. 336.

(*r*) 52 & 53 Vict. c. 8, s. 15. See *Fitzgerald's Trustee* v. *Mellersh*, W. N. (1892) 4; Highmore, p. 62.

(*s*) Sect. 88 (2).

(*t*) Sect. 88 (3).

(*u*) *Suffield* v. *Commrs.*, (1908) 1 K. B. 865.

(*x*) Sect. 86 (1), (a) to (g).

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to a reversion of or affecting any lands, estate, or property, real or personal, heritable or moveable whatsoever: and

"Any deed containing an obligation to infeft any person in an annual rent, or in lands or other heritable subjects in Scotland, under a clause of reversion, but without any personal bond or obligation therein contained for payment of the money or stock intended to be secured: and

"Any conveyance of any lands, estate, or property whatsoever, in trust to be sold or otherwise converted into money, intended only as a security, and redeemable before the sale or other disposal thereof, either by express stipulation or otherwise, except where the conveyance is made for the benefit of creditors generally, or for the benefit of creditors specified who accept the provision made for payment of their debts, in full satisfaction thereof, or who exceed five in number: and

"Any defeasance, letter of reversion, back bond, declaration, or other deed or writing for defeating, or making redeemable, or explaining, or qualifying, any conveyance, disposition, assignation, or tack of any lands, estate, or property whatsoever, apparently absolute, but intended only as a security: and

"Any agreement (other than an agreement chargeable with duty as an equitable mortgage), contract, or bond, accompanied with a deposit of title deeds for making a mortgage, wadset, or any such other security or conveyance as aforesaid of any lands, estate or property comprised in such title deeds, or for pledging or charging the same as a security: and

"Any deed whereby a real burden is declared or created on lands or heritable subjects in Scotland: and

"Any deed operating as a mortgage of any stock or marketable security."

The above sub-sections (a) to (g) are not to be taken as though they were parallel clauses extending the introductory words defining the meaning of "mortgage," and adding cases not within them. They only add by way of greater precaution, and to avoid misapprehension, an extensive though possibly not exhaustive list of various sorts of instruments which, if they answer the requirements of the introductory words, will be mortgages within the meaning of the Act. To treat them as operating independently would be to deprive of effect the very words defining the meaning of mortgage (*y*).

An instrument (for example, a debenture trust deed) is none the less a security because no money was advanced on it at the time of its execution (*z*).

What is property.

It may now be regarded as settled, notwithstanding some early decisions to the contrary, that the expression "property" in relation to stamp duty includes anything "which belongs to a person exclusive of others and which can be the subject of bargain and sale to another" (*a*). *Ad valorem* duty will accordingly be payable on a mortgage of a judgment debt (*b*), or a policy of assur-

(*y*) *City of London Brewery* v. *Commrs.*, (1899) 1 Q. B. at p. 139.

(*z*) *Suffield* v. *Commrs.*, (1908) 1 K. B. 865.

(*a*) Per Pollock, C.B., in *Potter* v. *Commrs.*, 10 Exch. 147.

(*b*) *Caldwell* v. *Dawson*, 5 Exch. 1.

ance (*b*), or the goodwill of a business (*c*), or the interest of a partner in the assets of the partnership (*d*).

Conditional surrenders, &c.

With regard to stamp duties on surrenders and other assurances by way of mortgage of copyhold and customary lands, the Act of 1891 (*e*) enacts as follows:—

"(4.) Where any copyhold or customary lands or hereditaments are mortgaged alone by means of a conditional surrender or grant, the *ad valorem* duty is to be charged on the surrender or grant, if made out of court, or the memorandum thereof, and on the copy of court roll of the surrender or grant, if made in court.

"(5.) Where any copyhold or customary lands or hereditaments are mortgaged, together with other property, for securing the same money or the same stock, the *ad valorem* duty is to be charged on the instrument relating to the other property, and the surrender or grant, or the memorandum thereof, or the copy of court roll of the surrender or grant, as the case may be, is not to be charged with any higher duty than ten shillings."

Where a mortgage of copyhold or customary lands is effected in the first instance by means of a deed of covenant to surrender, containing covenants for payment of principal and interest and other usual mortgage clauses, is not immediately followed by a surrender upon which *ad valorem* duty is paid, the *ad valorem* duty should be impressed on the covenant to surrender, and the subsequent surrender when taken will be chargeable with a duty of 6*d.* per 100*l.* as an instrument of further assurance, but with a maximum limit of 10*s.* (*f*).

Duty of steward.

The steward of a manor must not accept in court any surrender or make in court any grant until a note is delivered to him stating all facts affecting liability to duty of the copy of court roll of such surrender or grant, and he may refuse to accept such surrender, or to make such grant until the duty is paid; he must not admit any tenant under any surrender or grant made out of court which is not duly stamped (*g*).

Collateral security.

The principal security can be looked at in order to determine the character of a collateral security (*h*). Thus a conveyance to trustees for securing debentures in substitution for other hereditaments already subject to the trust deed was held liable to collateral duty (*i*), and so was a conveyance to trustees pursuant to a covenant in the original trust deed, though such conveyance did not itself create any obligation to repay money (*k*). But a

(*b*) See previous page.
(*c*) *Potter* v. *Commrs.*, *sup.*
(*d*) *Christie* v. *Commrs.*, L. R. 2 Ex. 46; *Phillips* v. *Commrs.*, L. R. 2 Ex. 399.
(*e*) Sect. 87 (4).
(*f*) See Schedule to Act, *post*, p. 1551. See Alpe (12th ed.), 189.
(*g*) Act of 1891, ss. 66, 67.
(*h*) As to collateral duty, see *post*, p. 1551.
(*i*) *Gartsides Brewery* v. *Commrs.*, 82 L. T. 686.
(*k*) *British Oil, &c.* v. *Commrs.*, (1903) 1 K. B. 689.

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trust deed for securing debentures is not treated as a collateral security if the debentures are duly stamped (*l*). The duty, however, on collateral securities is now limited to 10*s*. (*m*).

Further charge.

A deed of further charge will generally be liable only to *ad valorem* duty as a mortgage on the further principal sum advanced (*n*); but if additional property is thereby charged by way of further security for the original and further advances, *ad valorem* duty at the rate of 6*d*. per 100*l*. will also be payable on the amount of the original advance (*o*). No security by way of further charge is now chargeable with duty by reason of its containing covenants or provisions in relation to, or any further assurance of property comprised in, the original mortgage (*p*).

Wadsets, &c.

Wadsets and heritable bonds are securities of the nature of mortgages known to the law of Scotland (*q*). The expression "disposition" in sect. 86 of the Act of 1891 is used in a strictly technical sense referring to Scotch instruments (*r*). "Assignation" and "tack" are Scotch legal terms signifying "assignment" and "demise" respectively.

Agreements with deposit of deeds.

It was formerly considered that agreements or memoranda accompanying deposits of documents of title, which merely recorded the circumstances of the loan, were not liable to *ad valorem* duty as mortgages (*s*); but such agreements or memoranda, if under hand only, would be liable to duty as "equitable mortgages" under the Act of 1891, s. 86 (2).

A bond accompanied by a deposit of deeds duly stamped is not invalidated by a collateral agreement for a mortgage of the same date unduly stamped (*t*).

Memorandum of pledge.

A memorandum relating to a deposit of goods by way of pledge, containing a power of sale which does not contain words capable of passing more than a special property in the goods, is not chargeable with stamp duty (*u*).

Attornment.

An attornment clause in a mortgage does not render the deed liable to duty as a lease, and a separate attornment, if under hand only, is not liable to stamp duty (*x*), unless it contains special stipulations, in which case it must be stamped as an agreement (*y*).

(*l*) *Ibid.*
(*m*) Revenue Act, 1903, s. 7.
(*n*) *Ante*, p. 1530.
(*o*) See Schedule, *post*, p. 1551.
(*p*) Sect. 87, sub-sect. (3), *post*, p. 1538.
(*q*) Bell's Scotch Law Dict.
(*r*) *Harris* v. *Birch*, 9 M. & W. 591.
(*s*) *Meek* v. *Bayliss*, 31 L. J. Ch. 448.
(*t*) *Blair* v. *Ormond*, 14 Q. B. 732.
(*u*) *Attenborough* v. *Commrs.*, 11 Exch. 461. See *Huxley* v. *O'Connor*, 8 C. & P. 204.
(*x*) *Doe* d. *Linsey* v. *Edwards*, 5 A. & E. 95; *Doe* d. *Wright* v. *Smith*, 8 A. & E. 255. See also *Walker* v. *Giles*, 6 C. B. 662.
(*y*) *Cornish* v. *Scarell*, 8 B. & Cr. 471; *Doe* d. *Frankis* v. *Frankis*, 11 A. & E. 792.

Agreements chargeable as equitable mortgages.

Agreements chargeable with duty as equitable mortgages are excluded from the general definition of the expression "mortgage" for the purposes of the Stamp Act, 1891, and by the First Schedule to that Act duty at the rate of 1*s.* per 100*l.* (*z*) is specially charged on "equitable mortgages," which are defined as follows (*a*):—

Meaning of "equitable mortgage."

"For the purpose of this Act the expression 'equitable mortgage' means an agreement or memorandum, under hand only, relating to the deposit of any title deeds or instruments constituting or being evidence of the title to any property whatever (other than stock or marketable security), or creating a charge on such property."

The definition, however, is construed by the Inland Revenue authorities to denote only the simplest forms of equitable mortgage, containing little if anything more than a memorandum of deposit of deeds, an undertaking to pay principal and interest, and to execute a legal mortgage if called upon. An equitable mortgage, though under hand only framed with the object of placing the mortgagee in as good or nearly as good a position as a legal mortgagee (for example, by giving him a power of sale, power to take possession, and powers conferred by the Conveyancing Act, 1881), is required to be stamped with a duty of 2*s.* 6*d.* per 100*l.* under sect. 86, sub-sect. 1 (e) (*b*).

Agreement for legal mortgage.

A formal legal mortgage made pursuant to an agreement where the agreement is liable to the duty of 2*s.* 6*d.* per 100*l.* must be stamped with substituted security duty of 6*d.* per 100*l.*, subject to the limit of 10*s.* imposed by the Revenue Act, 1903. If, however, the agreement is chargeable as an equitable mortgage, the duty on the formal mortgage must be at the rate of 2*s.* 6*d.* per 100*l.* (*c*).

An agreement under seal, made in consideration of an advance, to execute a legal mortgage when called upon by the lenders in order to secure the advance, is chargeable as a mortgage (*d*).

As regards equitable mortgages, not under seal, of stock, the Act of 1891 enacts as follows:—

Certain mortgages of stock to be chargeable as agreements.

Sect. 23.—"(1.) Every instrument under hand only (not being a promissory note or bill of exchange) given upon the occasion of the deposit of any share warrant or stock certificate to bearer, or foreign or colonial share certificate, or any security for money transferable by delivery, by way of security for any loan, shall be deemed to be an agreement, and shall be charged with duty accordingly.

"(2.) Every instrument under hand only (not being a promissory note or bill of exchange) making redeemable or qualifying a duly stamped

(*z*) *Post*, p. 1551.
(*a*) Sect. 86, sub-sect. (2).
(*b*) Alpe (12th ed.), 187.
(*c*) Alpe (12th ed.), 181.
(*d*) *United Realization Co.* v. *Commrs.*, (1899) 1 Q. B. 361.

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transfer, intended as a security, of any registered stock or marketable security, shall be deemed to be an agreement, and shall be charged with duty accordingly.

"(3.) A release or discharge of any such instrument shall not be chargeable with any *ad valorem* duty."

"Marketable security."

The expression "marketable security" means a security of such a description as to be capable of being sold in any stock market in the United Kingdom (*e*). The true test is not whether the security is quoted, but whether it is capable of being sold (*f*).

Amendments as to the payment of stamp duty on certain foreign securities.

By the Finance Act, 1895, s. 14, it is provided that where foreign securities are issued in the United Kingdom, but the interest is not payable in the United Kingdom, the duty may in certain cases be paid without the necessity of the securities being stamped.

By the Finance Act, 1899, s. 4, duty is payable on foreign and colonial marketable securities transferable by delivery which are assigned, transferred, or in any manner negotiated in the United Kingdom.

Double duties.

By the Finance Act, 1910, ss. 74, 76, the duties on conveyances and on certain marketable securities are now double what they were before the Act.

But a conveyance or transfer made for nominal consideration for the purpose of securing the repayment of an advance or loan is not charged with duty under sect. 74 (*g*).

Securities for transfers of stock.

As to securities for transfers of stock, the Stamp Act of 1891 (*h*) enacts as follows:—

Direction as to duty in certain cases.

Sect. 87.—"(1.) A security for the transfer or re-transfer of any stock is to be charged with the same duty as a similar security for a sum of money equal in amount to the value of the stock; and a transfer, assignment, disposition, or assignation of any such security, and a reconveyance, release, discharge, surrender, re-surrender, warrant to vacate, or renunciation of any such security, is to be charged with the same duty as an instrument of the same description relating to a sum of money equal in amount to the value of the stock."

The 87th section further enacts:—

Securities for payment of rent-charges, &c.

"(2.) A security for the payment of any rent-charge, annuity or periodical payments, by way of repayment, or in satisfaction or discharge of any loan, advance, or payment intended to be so repaid, satisfied, or discharged, is to be charged with the same duty as a similar security for the payment of the sum of money so lent, advanced, or paid" (*i*).

(*e*) Sect. 122; and see sect. 82.

(*f*) *Texas Land and Cattle Co.* v. *Commrs.*, 16 C. of S. Cas. (4th series), 69; *Brown, Shipley & Co.* v. *Commrs.*, (1895) 2 Q. B. 598, C. A.

(*g*) See sub-sect. (6).

(*h*) 54 & 55 Vict. c. 39. For definition of stock, see sect. 122.

(*i*) *Mersey Docks, &c.* v. *Commrs.*, (1897) 2 Q. B. 316.

Equitable assignments of debts.

An order to pay a debt, given to the holder of a fund which is the property of the debtor, operating by way of equitable assignment (*k*), *if delivered to the creditor or his agent,* required a stamp as an inland bill of exchange within 55 Geo. III. c. 184; nor was the case altered though the creditor, immediately after delivery to him, went in company with the drawer and handed over the order to the drawee (*l*). But it was otherwise if the order was delivered to the fundholder (*m*); or, as it seems, if such had been the agreement between the debtor and creditor; or if an agreement to give a lien on the fund distinct from the order could be proved, and the order be used as evidence of that agreement (*n*).

An order by a creditor to his debtor to pay the amount of his contract to a third person is liable to a stamp as an assignment, and not as an order for payment (*o*).

Debenture trust deed.

When debenture stock is secured by a trust deed, that deed is stamped with *ad valorem* duty at the rate of 2*s.* 6*d.* per cent. on the amount of the stock (*p*), unless under the Finance Act, 1899, s. 8 (*q*), the duty has been paid on the statement of loan capital, stock certificates need not be stamped. A debenture trust deed may, however, be chargeable with duty as a collateral security (*r*).

Where debenture stock is cancelled and new debenture stock is issued in substitution for the cancelled stock, there is an issue of loan capital, and the company must deliver for the purposes of stamp duty a statement of the amount secured by the new debenture stock (*s*). A rebate is now granted in such cases under sect. 10 of the Finance Act, 1907.

Debentures.

By the First Schedule to the Stamp Act, 1891, *ad valorem* mortgage duty is imposed on debentures (*t*). But the Stamp Acts contain no definition of the term "debenture." A debenture is a document which either creates a debt or acknowledges it (*u*). An instrument purporting to be a debenture is liable to duty as a debenture, although it contains no charge (*x*). The stamp duty

(*k*) As to equitable assignments, see *ante,* pp. 1505 *et seq.*

(*l*) *Lord Braybroke* v. *Meredith,* 13 Sim. 271; *Parsons* v. *Middleton,* 6 Ha. 261. See Act of 1891, s. 32.

(*m*) *Hutchinson* v. *Heyworth,* 9 A. & E. 375; *Walker* v. *Rostron,* 9 M. & W. 411.

(*n*) *Parsons* v. *Middleton,* 6 Ha. 261.

(*o*) *Brice* v. *Bannister,* 3 Q. B. D. 569; *Buck* v. *Robson,* 3 Q. B. D. 686; *Fisher* v. *Calvert,* W. N. (1879) 7. See *Webb* v. *Smith,* 30 Ch. D. 192; and Act of 1891, s. 32.

(*p*) *British Oil, &c.* v. *Commrs.,* (1903) 1 K. B. 689, 696.

(*q*) Amended 3 Edw. VII. c. 46, s. 5.

(*r*) *Ante,* p. 1533.

(*s*) *Att.-Gen.* v. *Regent's Canal and Dock Co.,* (1904) 1 K. B. 263; *London and India Docks* v. *Att.-Gen.,* (1909) A. C. 7.

(*t*) *Post,* p. 1551.

(*u*) *Levy* v. *Abercorris Slate Co.,* 37 Ch. D. 260.

(*x*) *British India Steam Naviga-*

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payable in respect of registered debentures is 2*s.* 6*d.* per cent., and bearer debentures 10*s.* per cent. (*y*). If the debentures are so stamped a trust deed securing the debentures only requires a 10*s.* stamp. In the case of a trust deed securing debenture stock the duty is usually paid on the deed, and the stock certificates containing no charge do not require stamping, except as marketable securities (*z*).

Premium or bonus.

Where a company is bound to pay a bonus or premium on redemption of a debenture, *ad valorem* duty is payable on the amount of the bonus or premium in addition to the amount of the debenture (*a*); but it is otherwise where the company has an option to redeem debentures upon payment of a bonus or premium (*b*). A premium payable in an uncertain event not dependent upon the option of the obligors is in practice treated as part of the amount secured (*c*).

Transfer containing new covenants, &c.

The Act of 1891, s. 87, contains the following enactment as to stamp duties on transfers of mortgages and further charges:—

"(3.) A transfer of a duly stamped security, and a security by way of further charge for money or stock, added to money or stock previously secured by a duly stamped instrument, is not to be charged with any duty by reason of its containing any further or additional security for the money or stock transferred or previously secured, or the interest or dividends thereof, or any new covenant, proviso, power, stipulation or agreement in relation thereto, or any further assurance of the property comprised in the transferred or previous security."

A transfer of a mortgage, though further security be given, is only chargeable with duty as a transfer (*d*).

Calculation of transfer duty.

Transfer duty is payable on the whole amount of the debt expressed to be transferred, though the amount actually paid as consideration for the transfer is of less amount (*e*). Interest in arrear must be included in the amount upon which transfer duty is paid in all cases where the instrument is chargeable with *ad valorem* duty. In the case of a transfer of a collateral security the practice is to limit the duty to ten shillings (*f*).

Denoting stamp on further charge.

Securities by way of further charge will be stamped with a denoting stamp, showing that the full *ad valorem* duty was paid on the original instrument (*g*).

tion Co. v. *Commrs.*, 7 Q. B. D. 165. See *Brown, Shipley & Co.* v. *Commrs.*, (1895) 2 Q. B. 598, C. A.

(*y*) The duty on bearer debentures is now doubled: Finance Act, 1910, s. 76.

(*z*) As to debentures creating a charge on ships, see *Deddington* v. *Commrs.*, (1911) 2 K. B. 1001.

(*a*) *Rowell* v. *Commrs.*, (1897) 2 Q. B. 194.

(*b*) *Knight's Deep, Ltd.* v. *Commrs.*, (1900) 1 Q. B. 217, C. A.

(*c*) Alpe (12th ed.), p. 186.

(*d*) *Wale* v. *Commrs.*, *inf.*

(*e*) Alpe (12th ed.), 182.

(*f*) *Ibid.*

(*g*) Act of 1891, s. 11. See Alpe (12th ed.), 25.

In determining whether an instrument is liable to duty as a transfer only, or to the full duty as a mortgage, the Court will look at the substance of the transaction, and not only at the form of the instrument (*h*). So, where a mortgage for 350*l.* was paid off by a third person, who advanced a further sum, and a mortgage was given for a sum equal to both sums, in which the mortgagee joined, this was held to be a transfer for 350*l.*, although there was no formal assignment of the whole debt, and though that debt and the equity of redemption were extinguished, and the *ad valorem* stamp was payable on the 350*l.* as a transfer (*i*).

Substance of transaction regarded.

The fact that a new proviso for redemption relates only to part of the original debt does not render the instrument liable to further duty as a partial release (*k*).

Where a deed was executed by a mortgagor, professing to be a transfer of a mortgage for 150*l.*, and a security for a further advance of 70*l.*, on which sum the stamp was calculated; but as the original mortgagee did not execute it, an objection was raised that the deed in fact amounted to an original mortgage for 220*l.*; it was held that it could not fairly be said so to operate, and that the stamp was sufficient (*l*).

A mortgage deed which bore an *ad valorem* stamp on the amount advanced did not require a deed stamp because it contained also an assignment by a former mortgagee, to whom part of the money was paid in satisfaction of his mortgage (*m*).

Where a memorandum of deposit of deeds was also a promissory note, and was duly stamped as such and as a mortgage, it was held that an indorsee might sue upon it, although it bore no transfer stamp (*n*).

Promissory note accompanying deposit of deeds.

Where a mortgage is given as further security for a promissory note, the practice is to charge the full mortgage duty on the further security (*o*).

A deed of transfer of a mortgage for 1,500*l.* to which the mortgagor was a party, containing a further charge of costs and arrears of interest paid by the transferee to the transferor and converted into principal, was admitted upon a transfer stamp only (*p*).

Capitalization of interest on transfer.

(*h*) See *City of London Brewery* v. *Commrs.*, (1899) 1 Q. B. 121, C. A.

(*i*) *Wale* v. *Commrs.*, 4 Ex. D. 270.

(*k*) *Humphreys* v. *Commrs.*, 81 L. T. 199.

(*l*) *Doe* v. *Tom*, 4 Q. B. 615.

(*m*) *Doe* v. *Lewis*, 13 M. & W. 241. See also *Robinson* v. *Macdonnell*, 5 M. & S. 228.

(*n*) *Wise* v. *Charlton*, 4 A. & E. 786.

(*o*) Alpe (12th ed.), 182.

(*p*) *Doe* v. *Maple*, 6 L. J. N. S. C. P. 271; the point is not noticed in the reports of the same case in 5 Sc. 35, and 3 Bing. N. S. 832. Apparently a different view is taken by the Inland Revenue Commissioners, see Alpe on Stamp Duties (12th ed.), p. 182. The decision is not to be relied on, see *ante*, p. 1529.

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Transfer on appointment of new trustees.

By sect. 62 of the Act of 1891, it is provided that a conveyance or transfer made for effectuating the appointment of a new trustee is not to be charged with any higher duty than ten shillings (*q*). This also applies to a conveyance or transfer on the retirement of a trustee, although no new trustee is appointed (*r*). But where by one instrument new trustees are appointed and the trust property is vested in them, separate stamps are required (*s*). And a transfer by trustees and executors to a residuary legatee of shares and mortgages is chargeable with separate duties in respect of the shares and mortgages (*t*).

Transfer evidence without production of mortgage.

A transfer of a mortgage, to which the mortgagor is a party, reciting the mortgage, is admissible in evidence upon a transfer stamp without producing the original mortgage or showing that it was stamped (*u*).

Reconveyance.

Reconveyance duty is chargeable only on such discharges of mortgages as have the effect of wholly freeing the subject matter of the security, and is chargeable upon the total amount at any time secured.

On a conveyance by the mortgagor and mortgagee the deed is not chargeable with reconveyance duty in addition to the sale duty, but if the mortgage is released by a separate deed the extra duty would be incurred.

Reconveyance of collateral mortgage.

The reconveyance of a collateral security will require only a stamp of 10*s*., provided the reconveyance of the principal security is duly stamped with the full *ad valorem* duty. If the *ad valorem* duty is less than 10*s*., the reconveyance of the collateral security should be stamped with *ad valorem* duty (*x*).

Partial discharge of mortgage debt.

Where a mortgage debt is partially paid off and a deed of partial discharge is taken by the mortgagor, that deed will not be liable to *ad valorem* duty, but to a stamp of 10*s*., as being a deed not described in the schedule; but upon the final discharge of the mortgage debt the deed of reconveyance must bear duty in respect of the full amount originally advanced, not merely on the balance paid off at the time of the reconveyance (*y*).

Transfer of unpaid balance of mortgage debt.

On the same principle it would seem that if a mortgage is partly paid off and subsequently the security for the balance is transferred, no reconveyance duty will be payable in respect of the transfer, which will be liable to transfer duty on the balance

(*q*) As to the stamp being notice of the trust, see *ante*, p. 553.
(*r*) 2 Edw. VII. c. 7, s. 9.
(*s*) *Hadgett* v. *Commrs.*, 3 Ex. D. 46.
(*t*) Highmore (2nd ed.), pp. 46, 145.
(*u*) *Doe* v. *Maple*, 5 Sc. 35. See *Doe* v. *Brooks*, 3 A. & E. 513; *Quin* v. *King*, 1 M. & W. 42.
(*x*) Alpe (12th ed.), 183.
(*y*) *Munro* v. *Commrs.*, 33 Sc. L. R. 152; W. N. (1896) 149.

transferred; but when the mortgage is finally paid off, the reconveyance will be chargeable with the full amount of the original loan (*z*).

Receipt indorsed on mortgage.

A receipt acknowledging the payment of principal and interest endorsed upon an instrument chargeable with mortgage duty is not liable to reconveyance duty, and is exempt from receipt duty (*a*). But if such receipt expressly purports to be a release or discharge of the property or debt, it will be liable to full *ad valorem* duty as such (*b*). If a deed is so covered with indorsements that there is no room for a receipt, a paper containing the receipt may be annexed to the deed and will come within the exemption (*c*).

Limitation of equity of redemption in mortgage.

As to liability to duty of mortgages where the equity of redemption is thereby limited by way of settlement or otherwise, sect. 87 of the Act of 1891 enacts as follows:—

"(6.) An instrument chargeable with *ad valorem* duty as a mortgage is not to be charged with any further duty by reason of the equity of redemption in the mortgaged property being thereby conveyed or limited in any other manner than to a purchaser, or in trust for, or according to the direction of, a purchaser."

A mortgage deed expressed to be made in consideration of the advance, and also for the purpose of re-settling the property, and reserving the equity of redemption to the mortgagor and his wife or the survivor, does not require an extra stamp for a settlement in addition to the *ad valorem* stamp on the mortgage (*d*).

If property is conveyed by way of sale subject to a mortgage, the amount secured by the mortgage will form part of the consideration for the sale, and *ad valorem* duty, as on a conveyance on sale, will be payable on the aggregate amount made up of the sum so secured and the sum actually paid to the vendor for the equity of redemption. On this point the Act of 1891 enacts as follows:—

How conveyance in consideration of a debt is to be charged.

Sect. 57. "Where any property is conveyed to any person in consideration, wholly or in part, of any debt due to him, or subject either certainly or contingently to the payment or transfer of any money or stock, whether being or constituting a charge or incumbrance upon the property or not, the debt, money, or stock is to be deemed the whole or part, as the case may be, of the consideration in respect whereof the conveyance is chargeable with *ad valorem* duty."

(*z*) See Sol. J. vol. 40, p. 252.

(*a*) *Firth* v. *Commrs.*, (1904) 2 K. B. 205.

(*b*) See further, as to the practice of the Inland Revenue Commissioners as to stamp duty on reconveyances, Alpe on Stamp Duties (12th ed.), 182.

(*c*) *Orme* v. *Young*, 4 Camp. 336.

(*d*) *Dawson* v. *Medhurst*, 14 L. T. N. S. 622.

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Any interest owing on the mortgage debt at the time of the conveyance must be included in the consideration for the purpose of calculating the duty.

A conveyance by way of sale of a reversionary interest contingent upon the vendor surviving the tenant for life, subject to a mortgage to secure payment to a reversionary interest society of a sum of 38,000*l.* within three months after the death of the tenant for life, provided he should die without issue male, was held to be chargeable with an *ad valorem* duty on that sum, as well as on the purchase-money, the object of the Act being that upon every purchase *ad valorem* duty should be paid on the entire consideration, which either directly or indirectly represents the value of the free and unincumbered *corpus* of the subject-matter of sale (*e*).

So where an undertaking of a company was conveyed by way of sale to another company in consideration of a sum of stock in the purchasing company, and of that company taking over the debenture debts and ordinary debts of the vendor company, it was held that the conveyance was chargeable with the whole consideration made up of the value of the stock and the amount of the debts (*f*). So where a debt formed part of the consideration the conveyance duty was payable on the whole amount, irrespective of the fact that it was a bad debt (*g*).

If on the sale of an estate part or the whole of the purchase-money is raised by loan, and the estate is conveyed to the lender, subject to redemption by the purchaser, the *ad valorem* duty on sales to the full amount of the purchase-money, and the *ad valorem* duty on mortgage to the amount of the sum borrowed, will be both payable (*h*).

Release of equity of redemption.

Where upon the release of an equity of redemption to a mortgagee the amount owing upon the mortgage exceeds the value of the property, duty is only payable upon that value if satisfactory evidence thereof can be furnished (*i*). The adjudication stamp is necessary.

A release of an equity of redemption to a mortgagee which contains a declaration against merger is nevertheless liable to *ad valorem* conveyance duty in respect of the amount owing on the mortgage (*k*).

(*e*) *Mortimore* v. *Commrs.*, 2 H. & C. 838. The words of the Act are general, including a contingent mortgage.

(*f*) *Furness Rail. Co.* v. *Commrs.*, 33 L. J. Ex. 173; *G. W. Rail.* v. *Commrs.*, (1894) 1 Q. B. 507.

(*g*) *Commrs.* v. *North British Rail.*, (1901) 4 Court Sess. Cas. (5th series), 27.

(*h*) Dart, V. & P. (6th ed.), vol. ii. p. 796. See *Mortimore* v. *Commrs.*, 2 H. & C. 838.

(*i*) Alpe (12th ed.), p. 122; and see 32 Sc. L. R. 77.

(*k*) *Ibid.* 121.

An agreement for the sale of an equity of redemption in land situate out of the United Kingdom is liable to *ad valorem* duty under sect. 59 of the Act of 1891 (*l*). Equity of redemption abroad.

An order for foreclosure absolute is chargeable with duty as a conveyance (*m*). It was at one time doubted whether the words "conveyance on sale" in sect. 54 of the Stamp Act, 1891, included a foreclosure order, but this doubt was removed by sect. 6 of the Finance Act, 1898, which is declaratory, and therefore retrospective (*n*). Foreclosure order.

By sect. 37 of 10 Geo. IV. c. 56, all bonds, and securities, and instruments, and documents of a friendly society, were exempted from stamp duties; and by virtue of the incorporation of that Act in the Benefit Building Societies Act, 1836 (*o*), this exemption still exists, as regards bonds, securities, &c. of unincorporated building societies, subject to the limitation stated below. Building societies.

It was held under this section that mortgages made to building societies by their members, under the provisions of the Act of 1836, were exempt from the payment of stamp duty (*p*), though the mortgage was made before the rules were certified (*q*), and that mortgages by strangers to the society were also exempted (*r*).

By the Stamp Act, 1891 (*s*), it is enacted, that the exemption from stamp duty conferred by the statute 6 & 7 Will. IV. c. 32, for the regulation of benefit building societies is not to extend to any mortgage made after the 31st July, 1868, except a mortgage by a member of a benefit building society for securing the repayment to the society of money not exceeding 500*l*. Mortgages by members to secure sums exceeding 500*l*., and all mortgages by strangers, are thus liable to duty.

Mortgages to incorporated building societies are liable to stamp duty in the ordinary way, being expressly excluded from the exemption contained in the Building Societies Act, 1874 (*t*); but a reconveyance indorsed upon or annexed to a mortgage is exempt from stamp duty in the same way that the statutory form of receipt is exempt under sect. 41 (*u*). Incorporated societies.

A mortgage to a friendly society is not exempt from stamp Friendly societies.

(*l*) *Farmer* v. *Commrs.*, (1898) 2 Q. B. 141.
(*m*) Finance Act, 1898, s. 6.
(*n*) *Re Lovell and Collard*, (1907) 1 Ch. 249.
(*o*) 6 & 7 Will. IV. c. 32.
(*p*) *Mosley* v. *Baker*, 3 De G. M. & G. 1032, n.; *Walker* v. *Giles*, 6 C. B. 662; *Barnard* v. *Pilsworth*, 6 C. B. 698, n.
(*q*) *Williams* v. *Hayward*, 22 Beav. 220.
(*r*) *Thorn* v. *Croft*, L. R. 3 Eq. 193; and see *Att.-Gen.* v. *Gilpin*, L. R. 6 Ex. 193; *Att.-Gen.* v. *Phillips*, 22 Beav. 220.
(*s*) 54 & 55 Vict. c. 39, s. 89.
(*t*) 37 & 38 Vict. c. 42, s. 41.
(*u*) *Old Battersea Bldg. Soc.* v. *Commrs.*, (1898) 2 Q. B. 294.

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duty (*x*); but a statutory receipt which vacates a mortgage is exempt (*y*).

Mortgages, &c. of ships.

Instruments for the sale, transfer, or other disposition, either absolutely or by way of mortgage, or otherwise, of any ship or vessel, or any part, interest, share or property of or in any ship or vessel, are exempted from stamp duty (*z*).

Bottomry bonds are within this exemption; as, also, mortgages of freight, which is regarded as inseparably appurtenant to the ship (*a*).

By the Bankruptcy Act, 1883 (*b*), it is enacted that:—

Exemption in bankruptcy of deeds, &c. from stamp duty.

Sect. 144. "Every deed, conveyance, assignment, surrender, admission, or other assurance relating solely to freehold, leasehold, copyhold, or customary property, or to any mortgage, charge, or other incumbrance on, or any estate, right, or interest in, any real or personal property which is part of the estate of any bankrupt, and which, after the execution of the deed, conveyance, assignment, surrender, admission, or other assurance, either at law or in equity, is or remains the estate of the bankrupt or of the trustee under the bankruptcy, and every power of attorney, proxy paper, writ, order, certificate, affidavit, bond, or other instrument or writing relating solely to the property of any bankrupt, or to any proceeding under any bankruptcy, shall be exempt from stamp duty, except in respect of fees under the Act" (*c*).

Instruments relating to property of Crown.

With regard to instruments relating to property of the Crown, the Stamp Act, 1891, s. 119, enacts that they shall be charged with the same duty as instruments of the same kind relating to property of a subject.

Terms upon which instruments not duly stamped may be received in evidence.

The terms upon which instruments not duly stamped may be received in evidence will be found in sect. 14 of the Stamp Act, 1891.

The want of a stamp does not generally affect the validity of the instrument; and, accordingly, a deed of conveyance, by way of mortgage or otherwise, without any stamp, will pass the estate. But the instrument, until stamped, will not be admissible in evidence or otherwise for the purpose of founding thereon or supporting thereby a claim in any Court (*d*).

As a general rule it is sufficient if the instrument is properly stamped when it is produced (*e*). Where an instrument is stamped

(*x*) *Re Royal Liver Friendly Soc.*, L. R. 5 Ex. 78.

(*y*) 59 & 60 Vict. c. 25.

(*z*) Act of 1891, 1st Schedule. As to debentures creating a charge on ships, see *Deddington Co.* v. *Commrs.*, (1911) 2 K. B. 1001; *ante*, p. 275.

(*a*) *Willis* v. *Palmer*, 7 C. B. N. S. 340, 358.

(*b*) 46 & 47 Vict. c. 52; and see Rule 52.

(*c*) Extended to winding-up of companies by Finance Act, 1895, s. 16.

(*d*) *Duck* v. *Braddyll*, 13 Pri. 455; *Robinson* v. *Macdonnell*, 5 M. & S. 228; *Browne* v. *Savage*, 4 Drew. 635.

(*e*) *Clarke* v. *Jones*, 3 Dowl. P. C. 277; *Preston* v. *Eastwood*, 7 T. R. 95.

after execution, it is rendered operative as from the time of execution, and not merely from the time when the stamp is affixed (*f*).

Meaning of "duly stamped."

"Duly stamped" in sub-sect. (4) of sect. 14 means sufficiently stamped according to the law in force at the time when the instrument was actually executed, without regard to the date borne on the face of the instrument (*g*).

With regard to bills of sale of chattels, the Act of 1891 enacts as follows:—

Bills of sale.

Sect. 41. "A bill of sale is not to be registered under any Act for the time being in force relating to the registration of bills of sale unless the original, duly stamped, is produced to the proper officer."

Inasmuch as by the Bills of Sale Act, 1882 (*h*), a bill of sale given by way of security is absolutely void unless registered within the prescribed time, it is obvious that such a bill of sale cannot be rendered admissible in evidence for the purpose of enforcing the security, by being stamped after the period for registration has elapsed. It would seem, however, that a bill of sale, though unstamped, may be admitted in evidence for the purpose of setting it aside as not being in accordance with the Bills of Sale Acts (*i*).

An absolute bill of sale is a conveyance within the meaning of the Stamp Act, and is therefore subject to duty on the amount of the consideration.

Penalty upon stamping instruments after execution.

By sect. 15 of the Act of 1891 certain penalties are imposed upon stamping instruments after execution (*k*).

It has been decided that if a deed is produced bearing the proper stamp, but which is proved not to have been stamped at the time of its execution, the Court will receive it in evidence, without inquiring whether the stamp was affixed on payment of the proper penalties, nor will the memorandum by the Commissioners of Stamps, indorsed on the deed, of payment be admissible as evidence of the actual amount of penalty paid. But if the revenue laws require the stamp to be affixed within a given period, the Court will, in such case, inquire into the time when the deed was stamped (*l*).

A discharged mortgage by way of demise, which passed the legal estate in the term and was not duly stamped, is an objection to a title, though the mortgagee is willing to join in the conveyance to a purchaser, and must be duly stamped at the vendor's

(*f*) *Taylor* v. *Luke*, 8 Mod. 226; *R.* v. *Bishop of Chester*, 8 Mod. 364.
(*g*) *Clarke* v. *Roche*, 3 Q. B. D. 170.
(*h*) 45 & 46 Vict. c. 43.
(*i*) *Coppock* v. *Bower*, 4 M. & W. 361.
(*k*) See Finance Act, 1895, s. 15.
(*l*) *R.* v. *Inhabitants of Preston*, 5 B. & Ad. 1029.

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expense, inasmuch as the purchaser is entitled to use the term afterwards if necessary as a protection to him (*m*).

With regard to assignments, by way of mortgage or otherwise, of policies of life assurance, the Act of 1891 enacts as follows:—

Assignment of policy of life assurance to be stamped before payment of money assured.

Sect. 118.—"(1.) No assignment of a policy of life insurance shall confer on the assignee therein named, his executors, administrators, or assigns, any right to sue for the moneys assured or secured thereby, or to give a valid discharge for the same, or any part thereof, unless the assignment is duly stamped, and no payment shall be made to any person claiming under any such assignment unless the same is duly stamped.

"(2.) If any payment is made in contravention of this section, the stamp duty not paid upon the assignment, together with the penalty payable on stamping the same, shall be a debt due to her Majesty from the person by whom the payment is made."

Instruments containing distinct matters.

With regard to instruments containing distinct matters the Act of 1891 enacts as follows:

Instruments to be separately charged with duty in certain cases.

Sect. 4. "Except where express provision to the contrary is made by this or any other Act,—

(a.) An instrument containing or relating to several distinct matters is to be separately and distinctly charged, as if it were a separate instrument, with duty in respect of each of the matters;

(b.) An instrument made for any consideration in respect whereof it is chargeable with *ad valorem* duty, and also for any further or other valuable consideration or considerations, is to be separately and distinctly charged, as if it were a separate instrument, with duty in respect of each of the considerations."

Where distinct sums are secured to different persons by the same deed, that deed will, in effect, comprise separate mortgages in favour of those persons, and will, therefore, require two or more separate stamps under sect. 4 of the Act of 1891. But if the mortgage is for an aggregate sum contributed by several persons, so that, though they have separate interests, there is a community of subjects, the security will, apparently, be sufficiently stamped if stamped with *ad valorem* duty for the aggregate amount (*n*).

The First Schedule to the Act of 1891 imposes the duty therein mentioned on duplicates and counterparts of instruments; and by sect. 72 of the Act it is enacted as follows:—

Provision as to duplicates and counterparts.

"The duplicate or counterpart of an instrument chargeable with duty (except the counterpart of an instrument chargeable as a lease, such counterpart not being executed by or on behalf of any lessor or grantor) is not to be deemed duly stamped unless it is stamped as an original instrument, or unless it appears by some stamp impressed thereon that the full and proper duty has been paid upon the original instrument of which it is the duplicate or counterpart."

(*m*) *Whiting to Loomes*, 17 Ch. D. 10, C. A.; but see and distinguish *Exp. Birkbeck Freehold Land Soc.*, 24 Ch. D. 119. And see sect. 117 of the Act of 1891.

(*n*) See *Reed* v. *Wilmott*, 5 Moo. & P. 553.

If the duty on the original deed exceeds 5*s*., the duplicate or counterpart will be stamped with a denoting stamp of 5*s*. on production of the original deed duly stamped; otherwise the duplicate or counterpart will be stamped in the ordinary way with the same duty as the original instrument (*o*).

A memorandum indorsed on a deed, if merely declaratory or explanatory of ambiguities in the deed, is not liable to duty unless under seal. But an indorsement will be liable to separate duty if it contains matter of agreement, whereby the operation of the deed is extended, limited, or varied (*p*). So, also, a memorandum indorsed on a mortgage deed to the effect that part of the money secured had been advanced by a person not a party to the deed was held to be liable to separate duty (*q*).

The First Schedule to the Act of 1891 contains a Table of Duties whereby the following duties are imposed on instruments relating to mortgage securities:—

AGREEMENT or CONTRACT, accompanied with a deposit.
See MORTGAGE, &c., and sects. 23 and 86 of Act of 1891.

ANNUITY, creation of, by way of security.
See MORTGAGE, &c. and sect. 87 of Act of 1891.

ASSIGNMENT or ASSIGNATION by way of security, or of any security.
See MORTGAGE, &c.

BILL OF SALE by way of security.
See MORTGAGE, &c., and sect. 41 of the Act of 1891 (*r*), *ante*, p. 1545.

BOND for securing the payment or repayment of money or the transfer or retransfer of stock.
See MORTGAGE, &c., and MARKETABLE SECURITY, p. 1551.

BOND, COVENANT, or INSTRUMENT of any kind whatsoever.

(1.) Being the only or principal or primary security for any annuity (*except upon the original creation thereof by way of sale or security, and except a superannuation annuity*), or for any sum or sums of money at stated periods, not being interest for any principal sum secured by a duly stamped instrument, nor rent reserved by a lease or tack.

For a definite and certain period, so that the total amount to be ultimately payable can be ascertained. — The same *ad valorem* duty as a bond or covenant for such total amount.

(*o*) Act of 1891, s. 11, and Sched.

(*p*) *Schumann* v. *Weatherhead*, 1 East, 537.

(*q*) *Doe* d. *Downe* v. *Govier*, 5 L. T. 37.

(*r*) Every affidavit on the registration of a bill of sale must bear a stamp of 2*s*. 6*d*.

Appendix.

For the term of life or any other definite period.

	£	s.	d.
For every 5*l.*, and also for any fractional part of 5*l.*, of the annuity or sum periodically payable - - - - - - - - -	0	2	6

(2.) Being a collateral or auxiliary or additional or substituted security for any of the above-mentioned purposes where the principal or primary instrument (*s*) is duly stamped.

Where the total amount to be ultimately payable can be ascertained - - - } The same *ad valorem* duty as a bond or covenant of the same kind for such total amount.

In any other case:

For every 5*l.*, and also for any fractional part of 5*l.*, of the annuity or sum periodically payable - - - - - - - -	0	0	6

BOND, accompanied with a deposit of title deeds, for making a mortgage, wadset, or other security on any estate or property therein comprised.

See MORTGAGE, &c., and sect. 86.

BOND, DECLARATION, or other DEED or WRITING for making redeemable any disposition, assignation, or tack, apparently absolute, but intended only as a security.

See MORTGAGE, &c., and sects. 23 and 86 of Act of 1891.

COLONIAL SECURITY. *See* MARKETABLE SECURITY, and sect. 82 of Act of 1891, *ante*, p. 1536.

CONDITIONAL SURRENDER of any copyhold or customary estate by way of mortgage.

See MORTGAGE, &c., and sects. 86 and 87 of Act of 1891, *ante*, pp. 1531, 1533.

CONVEYANCE or TRANSFER, whether on sale or otherwise,—

(1.) Of any stock of the Bank of England - - -	0	7	9
(2.) Of any stock of the Government of Canada inscribed in books kept in the United Kingdom, or of any Colonial stock to which the Colonial Stock Act, 1877, applies—			
For every 100*l.*, and also for any fractional part of 100*l.*, of the nominal amount of stock transferred -	0	2	6

And see sect. 62 of the Act of 1891.

CONVEYANCE or TRANSFER by way of security of any property (*except such stock as aforesaid*), or of any security.

See MORTGAGE, &c., and MARKETABLE SECURITY.

COPYHOLD and CUSTOMARY ESTATES—Upon a mortgage thereof.

See MORTGAGE, &c.

(*s*) As to meaning of "primary" security, see *Suffield* v. *Inland Revenue Commrs.*, (1908) 1 K. B. 865.

	£	s.	d.
COVENANT for securing the payment or repayment of money, or the transfer or retransfer of stock. *See* MORTGAGE, &c.			
COVENANT in relation to any annuity (*except upon the original creation and sale thereof*) or to other periodical payments. *See* BOND, COVENANT, &c.			
COVENANT. Any separate deed of covenant (*not being an instrument chargeable with ad valorem duty as a conveyance on sale or mortgage*) made on the sale or mortgage of any property, and relating solely to the conveyance or enjoyment of, or the title to, the property sold or mortgaged, or to the production of the muniments of title relating thereto, or to all or any of the matters aforesaid.			
Where the *ad valorem* duty in respect of the consideration or mortgage money does not exceed 10*s.*	A duty equal to the amount of such *ad valorem* duty.		
In any other case - - - - - - - - -	0	10	0
CUSTOMARY ESTATES. *See* COPYHOLD.			
DEBENTURE for securing the payment or repayment of money or the transfer or retransfer of stock. *See* MORTGAGE, &c., and *ante*, p. 1537.			
DEED whereby any real burden is declared or created on lands or heritable subjects in Scotland. *See* MORTGAGE, &c., and sect. 86.			
DEED containing an obligation to infeft any person in heritable subjects in Scotland, under a clause of reversion, as a security for money. *See* MORTGAGE, &c., and sect. 86.			
DEED containing an obligation to infeft or seize in an annuity to be uplifted out of heritable subjects in Scotland. *See* BOND, COVENANT, &c.			
DEED of any kind whatsoever, not described in this schedule	0	10	0
DEFEAZANCE. Instrument of defeazance of any conveyance, transfer, disposition, assignation, or tack, apparently absolute, but intended only as a security for money or stock. *See* MORTGAGE, &c., and sect. 86. In respect of marketable securities under hand only, *see* AGREEMENT, and sect. 23.			
DEPOSIT of title deeds. *See* MORTGAGE, &c., and sect. 86, *ante*, p. 1532.			
DISPOSITION of heritable property in Scotland to a purchaser, containing a clause declaring all or any part of the purchase-money a real burden upon, or affecting, the heritable property thereby disponed, or any part thereof. *See* MORTGAGE, &c., and sect. 86.			
DISPOSITION in security in Scotland. *See* MORTGAGE, &c.			

Appendix.

DISPOSITION of any wadset, heritable bond, &c. *See* MORTGAGE, &c. £ s. d.

DUPLICATE or COUNTERPART of any instrument chargeable with any duty.

Where such duty does not amount to 5*s*. - - - { The same duty as the original instrument.

In any other case - - - - - - - - - 0 5 0

And see sect. 72.

EIK to a reversion. *See* MORTGAGE, &c., and sect. 86.

EQUITABLE MORTGAGE. *See* MORTGAGE, &c., and sects. 23 and 86.

FOREIGN SECURITY. *See* MARKETABLE SECURITY, and sect. 82.

FURTHER CHARGE or FURTHER SECURITY. *See* MORTGAGE, &c., and sect. 86.

HERITABLE BOND. *See* MORTGAGE, &c., and sect. 86.

LETTER OF REVERSION in Scotland. *See* MORTGAGE, and sect. 86.

MARKETABLE SECURITY (*t*).

(1.) Marketable security (a) being a colonial government security, or (b) being a security not transferable by delivery, or (c) being a security transferable by delivery and bearing date or signed *or offered for subscription* (*u*) before or on the sixth day of August one thousand eight hundred and eighty-five—

For or in respect of the money thereby secured - { The same *ad valorem* duty according to the nature of the security as upon a mortgage.

(2.) TRANSFER, ASSIGNMENT, DISPOSITION, or ASSIGNATION of a marketable security of any description—

Upon a mortgage thereof—*see* MORTGAGE OF STOCK or Marketable Security.

MEMORIAL to be registered pursuant to any Act for the time being in force relating to the public registering of deeds in England or Ireland:

Where the instrument registered is chargeable with any duty not amounting to 2*s*. 6*d*. - - - { The same duty as the registered instrument.

In any other case - - - - - - - - - 0 2 6

(*t*) See 56 & 57 Vict. c. 7, s. 4. See also 62 & 63 Vict. c. 9, s. 4, which imposes a new duty on certain foreign and colonial instruments to bearer which are marketable; and see *Noakes* v. *Commrs.*, 83 L. T. 714. The duties on certain marketable securities are now doubled by sect. 76 of the Finance Act, 1910.

(*u*) The words in italics are repealed by 61 & 62 Vict. c. 46, s. 7.

MORTGAGE, BOND, DEBENTURE, COVENANT (except a marketable security otherwise specially charged with duty), and WARRANT OF ATTORNEY to confess and enter up judgment.	£	s.	d.
(1.) Being the only or principal or primary security (other than an equitable mortgage) for the payment or repayment of money:			
Not exceeding 10*l.* - - - - - - -	0	0	3
exceeding 10*l.* and not exceeding 25*l.* - - -	0	0	8
,, 25*l.* ,, 50*l.* - - -	0	1	3
,, 50*l.* ,, 100*l.* - - -	0	2	6
,, 100*l.* ,, 150*l.* - - -	0	3	9
,, 150*l.* ,, 200*l.* - - -	0	5	0
,, 200*l.* ,, 250*l.* - - -	0	6	3
,, 250*l.* ,, 300*l.* - - -	0	7	6
,, 300*l.*			
For every 100*l.*, and also for any fractional part of 100*l.*, of the amount secured - - - -	0	2	6
(2.) Being a collateral, or auxiliary, or additional, or substituted security (other than an equitable mortgage), or by way of further assurance for the above-mentioned purpose where the principal or primary security is duly stamped (*x*):			
For every 100*l.*, and also for any fractional part of 100*l.*, of the amount secured - - - -	0	0	6
But the whole amount of duty payable under or by reference to this paragraph (2) shall not exceed ten shillings (*y*).			
(3.) Being an equitable mortgage:			
For every 100*l.*, and any fractional part of 100*l.*, of the amount secured - - - - - -	0	1	0
(4.) TRANSFER, ASSIGNMENT, DISPOSITION, or ASSIGNATION of any mortgage, bond, debenture, or covenant (except a marketable security), or of any money or stock secured by any such instrument, or by any warrant of attorney to enter up judgment, or by any judgment:			
For every 100*l.*, and also for any fractional part of 100*l.*, of the amount transferred, assigned, or disponed, exclusive of interest which is not in arrear - - - - - - - -	0	0	6
And also where any further money is added to the money already secured - - - -	The same duty as a principal security for such further money.		
(5.) RECONVEYANCE, RELEASE, DISCHARGE, SURRENDER, RESURRENDER, WARRANT TO VACATE, or RENUNCIATION of any such security as aforesaid, or of the benefit thereof, or of the money thereby secured:			
For every 100*l.*, and also for any fractional part of 100*l.*, of the total amount or value of the money at any time secured (*z*) - - - - - - -	0	0	6

And see sects. 86, 87, 88, and 89.

(*x*) *City of London Brewery* v. *Commrs.*, (1899) 1 Q. B. 121, C. A.; *British Oil Mills* v. *Commrs.*, (1903) 1 K. B. 689, C. A.

(*y*) 3 Edw. VII. c. 46, s. 7; *Suffield* v. *Inland Revenue Commrs.*, (1908) 1 K. B. 865.

(*z*) *Firth* v. *Inland Revenue Commrs.*, (1904) 2 K. B. 205.

Appendix.

	£	s.	d.
MORTGAGE OF STOCK or Marketable Security— Under hand only. *See* AGREEMENT, and sect. 23. By deed. *See* MORTGAGE, and sect. 86.			
RECEIPT given for, or upon the payment of, money amounting to 2*l.* or upwards - - - - - - -	0	0	1

Exemptions.

(11.) Receipt indorsed or otherwise written upon or contained in any instrument liable to stamp duty, and duly stamped, acknowledging the receipt of the consideration money therein expressed, or the receipt of any principal money, interest, or annuity thereby secured or therein mentioned (*z*).

RECONVEYANCE, RELEASE, or RENUNCIATION of any security. *See* MORTGAGE, &c.

RELEASE or RENUNCIATION of any property, or of any right or interest in any property—
Upon a sale. *See* CONVEYANCE ON SALE.
By way of security. *See* MORTGAGE, &c.
In any other case - - - - - - - - - 0 10 0

RENUNCIATION. *See* RECONVEYANCE and RELEASE.

TACK IN SECURITY. *See* MORTGAGE, &c.

WADSET. *See* MORTGAGE, &c.

WARRANT OF ATTORNEY to confess and enter up a judgment given as a security for the payment or repayment of money, or for the transfer or retransfer of stock.
See MORTGAGE, &c.

Progressive duties have now ceased to be payable, having been totally repealed (*a*).

(*z*) See previous page. (*a*) 33 & 34 Vict. c. 99.

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reconveyance of lands in, 1433.
registration of deeds, 1267. *See* REGISTRATION.

Recat. A
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